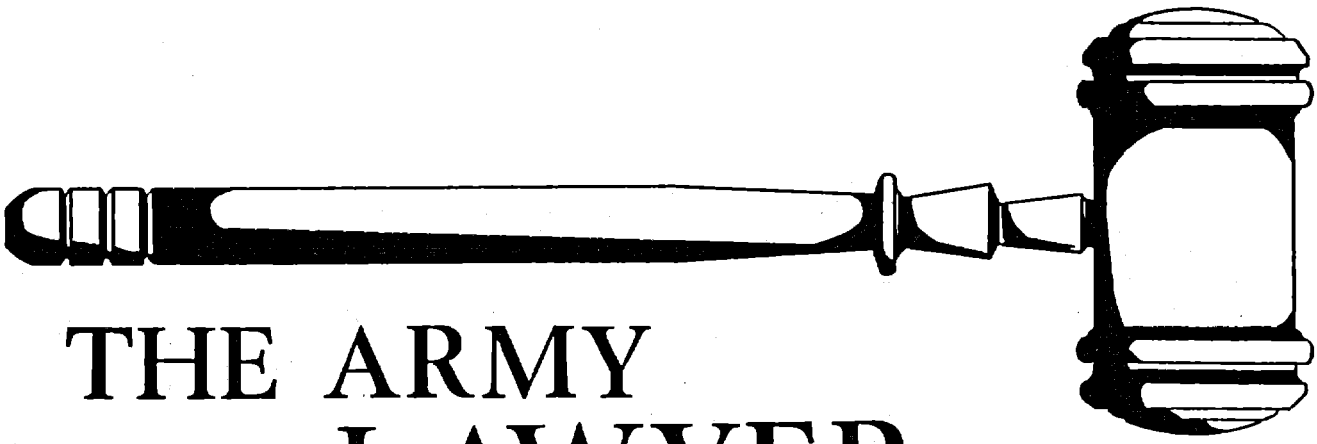

THE ARMY LAWYER

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Uncharged Misconduct

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Deputy Commandant, TJAGSA

Relevance problems are presented by evidence of uncharged misconduct, which both the trial and defense counsel may seek to introduce. When a party seeks to introduce such evidence to establish the crime charged, its probative value must outweigh the probability that the fact finder will attach undue weight to the evidence. Other factors militating against the admissibility of such evidence are waste of time, unfair surprise, and distraction from the main issue.[1]

Both the prosecutor and the defense counsel must be very circumspect about the introduction of uncharged misconduct. The prosecution should insure that the introduction of the evidence is not merely a ruse to show the defendant is a bad person; the evidence must be both logically and legally relevant to be admissible. The introduction of this type of evidence has been called "the Prosecutor's Delight."[2] The evidence may be so deadly that it results in conviction of an innocent individual.[3] The defense

[1]Michelson v. United States, 335 U.S. 469 (1948); Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 403 [hereinafter cited as Mil. R. Evid.]. Surprise is not mentioned in Rule 403 as a factor since the remedy for surprise is not inadmissibility of the evidence but a continuance.

[2]Comment, *Evidence of Prior Acquittals: An Attack on the "Prosecutor's Delight"*, 21 U.C.L.A. L. Rev. 892,896 (1974).

[3]*See* E. Imwinkelried, Uncharged Misconduct Evidence § 1:03 (1984) [hereinafter cited as Imwinkelried].

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-LA

21 NOV 1984

SUBJECT: Legal Assistance Representation of Both Spouses - Policy Letter 84-5

ALL JUDGE ADVOCATES

1. This letter reemphasizes and elaborates on the policy in AR 27-3, paragraph 2-2, which provides that representation of both parties in domestic relations matters is discouraged and should be avoided.

2. Where there is a conflict of interest, the attorney must explain to the prospective client why he or she cannot be seen in that office. The prospective client should be referred to another legal assistance office on the installation, to a legal assistance office on a nearby installation, or to a reserve judge advocate. If these alternatives are not feasible, the prospective client may be referred to another branch in the same staff judge advocate office or to a Trial Defense Service office. Only as a last resort and with approval of the staff judge advocate in each case will different attorneys in the same legal assistance office represent both sides. Cases in which circumstances justify such dual representation should be extremely few in number, and in those cases special precautions should be taken to maintain client confidences.

3. Regardless of which alternative is used, the legal assistance officer must ensure that some form of communication is actually made between the prospective client and the office to which that prospective client is referred. Ideally, a specific appointment with a particular attorney should be made. It is not enough merely to advise a client where alternative legal assistance is available.

4. In larger legal assistance offices, there may be problems determining whether one of the spouses is already being represented by the office. Staff judge advocates should establish procedures that will prevent inadvertent conflicts of interest from arising.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
Acting The Judge Advocate General

should not give the prosecution opportunities to introduce uncharged misconduct as substantive evidence, *e.g.*, to rebut the defense or to contradict the accused or key defense witness.

> Experienced trial attorneys know that the judge's ruling on the admission of uncharged misconduct can be the turning point in a trial. Uncharged misconduct evidence "will usually sink the defense without (a) trace." Some veteran defense attorneys shape their entire trial strategy to avoid the admission of uncharged misconduct.
>
> The available research data confirms this belief. Studies by the London School of Economics indicate that the admission of a defendant's uncharged misconduct significantly increases the likelihood of a jury finding of liability or guilt. The Chicago Jury Project reached the same conclusion. The Chicago researchers concluded that as a practical matter, the presumption of innocence operates only for defendants without prior criminal records. Evidence of uncharged misconduct strips the defendant of the presumption of innocence. If the judge admits a defendant's uncharged misconduct and the jury thereby learns of the record, the jury will probably use a "different . . . calculus of probabilities" in deciding whether to convict.[4]

[4]*Id.* § 1:03 (footnotes omitted).

When the defense seeks to introduce evidence of uncharged misconduct, the court must also consider whether excluding the evidence violates the right of compulsory process or right of confrontation.[5] When the defendant is charged with rape, the defense may be that the alleged victim sold the defendant poor marihuana. The defendant went to the victim's house to take some good marihuana with or without the consent of the victim. When he took the marihuana, the owner claimed that she was raped. To exclude the evidence of uncharged misconduct sought to be admitted by the accused would violate the defendant's sixth amendment rights.

I. Substantive Doctrine

The uncharged misconduct doctrine is that *if evidence of an act of uncharged misconduct plainly, clearly, and conclusively committed*

[5]People v. Flowers, 644 P.2d 917 (Colo. 1982). It was not error for the trial judge to refuse to allow defendant to show nine other sexual assaults had been committed in the same area within four months of the charged offense, that the details of the assaults were similar to the crime, and that each of the victims had given the police a description of the assailant that resembled the accused. *Cf.* United States v. Colon-Angueira, 16 M.J. 20, 23 (C.M.A. 1983). "The defense stated that the excluded evidence of the prosecutrix's post-offense sexual conduct was offered to show a motive on her part for consenting to sexual intercourse with appellant. *See* MIL. R. EVID. 404(b)." The court held that the exclusion of the evidence was not prejudicial error. *Id.* United States v. Dorsey, 16 M.J. 1, 5 (C.M.A. 1983). "In particular it attempted to show a motive for the prosecutrix's complaint of rape (MIL. R. EVID. 404(b)) and for her testimony at trial. (MIL. R. EVID. 608(c))."

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Editor
Captain Debra L. Boudreau

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by the defendant is logically relevant to prove a fact in issue other than the defendant's character, and outweighs the evidence's prejudicial character, the evidence is admissible.

"If evidence of an act"

When the proponent offers evidence on a character theory, the evidence usually takes the form of reputation or opinion testimony.[6] Evidence of a *specific act* is not admissible unless the "character or a trait of character of a person is an essential element of an offense or defense. . . ."[7] In contrast, when seeking to use an uncharged misconduct theory, the proponent seeks to prove evidence of *specific acts* by live testimony, admissible hearsay, and prior convictions.[8] In addition, a properly authenticated record of an *acquittal* is permitted by a majority of courts.[9] An acquittal indicates the prosecution did not prove its case beyond a reasonable doubt. Consequently, it is illogical not to permit evidence of an acquittal if the other standards are met. A good example is when the defendant is convicted of possession of marihuana with the intent to distribute. At the time of arrest the defendant had a large quantity of marihuana in his van. At trial, the defendant testified that he thought he was moving a load of furniture and did not know the contents of the truck. The prosecution will be allowed to introduce evidence that several months prior to the alleged offense he was acquitted of the same offense. Thus, the evidence is introduced to show that it was unlikely that the defendant would innocently come upon large quantities of marihuana on two separate occasions.[10]

Some support for the introduction of an acquittal as evidence of uncharged misconduct can be taken from *United States v. One Assortment of 89 Firearms*.[11] In that case the Court held that the fact that the defendant had been acquitted by reason of entrapment of making illegal firearm transactions would not bar the United States from instituting a forfeiture action for the seized firearms. The "Court reasoned that the difference between the burdens of proof and the criminal and civil cases precluded the application of the doctrine of collateral estoppel."[12] Regardless of the common view, "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proved the existence of a reasonable doubt as to his guilt."[13] This is true whether or not there were special findings as to the reasons for an acquittal.

This doctrine must also be distinguished from impeachment through instances of conduct under Military Rule of Evidence (Rule) 608(b). When instances of conduct are offered for impeachment, they must concern the character of the witness for untruthfulness. The evidence is not necessarily relevant to the alleged offense. Under the impeachment theory of the rule, the opponent is bound by the answer. The doctrine of uncharged misconduct does not require the evidence to relate to the truthfulness of the witness.

The uncharged misconduct theory must also be distinguished from introducing uncharged misconduct by the defendant when used by the police to establish probable cause to search or probable cause to apprehend.[14] When the de-

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[6]Mil. R. Evid. 405(a). The act may have been committed before or after the charged offense. *See infra* note 56 and accompanying text. *See also* Thwing, *Military Rule of Evidence 404(b): An Important Weapon in the Trial Counsel's Arsenal*, nn. 20-25, in this issue of *The Army Lawyer*.

[7]Mil. R. Evid. 405(a), (b). Two examples of when the proviso is applicable are first, a prosecution for operating a house of ill-repute under the Assimilated Crimes Act and the state statute makes character an issue; and second, the character of the accused for sentencing. J. Wigmore, Evidence §§ 78, 81 (3d ed. 1940).

[8]United States V. Adderly, 529 F.2d 1178 (5th Cir. 1976).

[9]Imwinkelried, *supra* note 3, at ch. 10. *See also* United States v. Dawkins, 2 M.J. 898 (A.C.M.R. 1976).

[10]United States v. Rocha, 553 F.2d 615 (9th Cir. 1977). *See also* United States v. Brown, 562 F.2d 1144 (9th Cir. 1977).

[11]104 S. Ct. 1099 (1984).

[12]*Id.*

[13]*Id.*

[14]E. Imwinkelried, P. Giannelli, F. Gilligan, & F. Lederer, Criminal Evidence ch. 16 (1979).

fendant introduced opinion or reputation evidence relevant to the character trait in issue, it is permissible for the prosecutor to question the witness about prior misconduct, arrests or convictions of the accused.[15] If the witness knows of the misconduct, arrests or conviction, it may impeach the witness by showing the witness' standard of goodness is lower than others. If the witness does not know of the misconduct, arrest or conviction, it may impeach the witness by showing the witness is not familiar with the reputation or character of the defendant. Likewise, a prior conviction may be used to impeach a witness including the accused.

"Of uncharged misconduct"

The use of the term "uncharged misconduct" is more accurate than "other crimes." If the term "other crimes" is used, it would inaccurately imply that evidence not amounting to a crime is inadmissible. The absence of criminality does not preclude the applicability of this doctrine. In *United States v. Woodyard*[16] the accused was charged with intent to commit sodomy. The court held that it was permissible for the trial judge to admit three magazines found in the accused's possession containing pictures of nude men engaged in homosexual acts. The court stated: "Likewise, possession of homosexual literature is not a crime. . . . However, the absence of criminality does not preclude the applicability of Rule 404(b), for that rule also encompasses 'wrongs or act.' Thus, although not criminal *per se*, any extrinsic activity which tends to reflect adversely on the accused is within Rule 404(b)."[17]

Likewise, "uncharged misconduct" is a better term than "similar crimes." The latter term is imprecise because the act need not be similar to the charged crime to be admissible under this theory. The litmus test is relevance rather than similarity, and the act can be relevant even if it is in no way similar to the charged crime. The courts often erroneously hold that unless the crime charged and the evidence sought to be admitted are similar, the evidence will not be logically relevant.[18] These courts, however, seem to require little similarity in cases of controlled substances.[19]

> However, the prevailing view of the United States is that even dissimilar acts can be relevant and admissible on an uncharged misconduct theory. There is an extensive body of case law admitting dissimilar acts for such purposes as proving the defendant's identity, intent, and motive and rebutting affirmative defense.[20]

There are numerous instances when the charged act is relevant even though the act is not at all similar to the charged offense. Suppose the defendant is charged with a robbery. The robber was wearing a T-shirt with the inscription "22d JAGC Hunter Killer Team." To identify the defendant as the robber, the prosecution could introduce evidence that the defendant had stolen a T-shirt with the same inscription. The charge of larceny and the charge of robbery are hardly similar crimes. Yet proof that the defendant was the thief of the T-shirt is relevant to prove that the defendant was also the robber.

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[15]Michelson v. United States, 335 U.S. 469 (1948).

[16]16 M.J. 715 (A.F.C.M.R. 1983).

[17]*Id.* at 718.

[18]United States v. Beechum, 555 F.2d 487 (5th Cir. 1977), *aff'd*, 582 F.2d 898 (5th Cir. 1978) (en banc) (conviction aff'd; prior panel opinion vacated).

[19]*See, e.g.*, United States v. Frederickson, 601 F.2d 1358, 1365 (8th Cir. 1979) [Note: This case deals with threats against the President, not controlled substances]. Dean Wigmore argued for the admission of anonymous acts in poisoning cases:

> The principle of Anonymous Intent. . . finds occasional application, particularly in poisoning cases. Other instances of death by poison under somewhat similar circumstances serve to negate the supposition of inadvertent taking or of mistaken administration, even though the person responsible for the other poisonings is not identified; and thus, a criminal intent having been shown for the act charged by whomever done, the defendant may be then shown to be its doer.

Imwinkelried, *supra* note 3, § 2:05 (footnote omitted).

[20]Imwinkelried, *supra* note 3, § 2:12 (footnotes omitted).

"Plainly, clearly, and conclusively committed by the defendant, co-accused, or conspirator"

The act is logically relevant in the case only if the defendant, a co-accused, or a conspirator committed the act.[21] Thus, the prosecution must establish the defendant's connection with the act. In *United States v. Stokes*,[22] the Court held that statements of a co-accused as to uncharged acts of misconduct were admissible to rebut the defense. "The rule limiting admissibility of uncharged misconduct does not shield an accused from the reception of evidence that he boasted of his past experience in crime in order to reassure a prospective vendee or coworker of his skill and reliability."[23] The statements of the co-conspirator were admissible because they were "clearly" uttered in the "execution of the conspiracy to sell for the purpose of persuading an undercover agent—apparently a hesitant buyer—to proceed with the purchase on the seller's terms."[24]

While the act of the accused's co-conspirator may be admissible under 405(b), the act of an unknown third party might also be logically relevant.

> Suppose that the defendant is charged with knowing possession of contraband drugs. The prosecutor has evidence that while the defendant was in a house, third persons were openly possessing and using drugs. Even if the prosecutor cannot establish an antecedent conspiracy between the defendant and the third persons, the evidence of the third parties' crime should be admitted. If the third parties openly use the contraband in the same house, their crimes are logically relevant to prove the defendant's knowledge.[25]

Even an anonymous act might be admissible.[26] While such act would not have no probative value on the issue of identity, it may show guilty knowledge on the part of the accused.

Because uncharged misconduct is highly prejudicial, the Court of Military Appeals has stated that a strict standard of proof must be met by the prosecution, establishing by *plain, clear, and conclusive evidence that the crime was committed by the defendant.*[27] Rule 404(b) does not expressly state the standard required of the prosecution.[28] Thus, a less stringent standard might be applied. This would depend on the general federal rule, since Rule 101(b) recognizes the rule generally applied in the federal courts.[29] The Court of Appeals for the Fifth Circuit has applied the same standard set forth by the Court of Military Appeals.[30]

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[21]United States v. Rainbolt, 43 C.M.R. 592 (A.C.M.R. 1970). The defendant was charged with the wrongful use of another officer's club card with the intent to defraud. Evidence was introduced that while the owner of the club card was on temporary duty at another installation, a number of credit charges were made to the owner's card. The court stated that evidence of uncharged misconduct was inadmissible unless it could be connected with the defendant. *But see* United States v. Dicupe, 14 M.J. 915 (A.F.C.M.R. 1982), *pet. granted*, 16 M.J. 102 (C.M.A. 1983). The accused was charged with stealing $1,000 from a cashier's safe when the cashier had failed to properly secure the safe. It was held permissible for the prosecution to introduce in evidence that several months before the offense charged a cashier had left her safe open. The next day she returned and $40 was missing. She *assumed* the accused had taken the money. The court erroneously held this to be admissible.

[22]12 M.J. 229 (C.M.A. 1982). *See also* Imwinkelried, *supra* note 3, § 2:05.

[23]12 M.J. at 239.

[24]*Id. See* United States v. Janis, 1 M.J. 395 (C.M.A. 1976). The defendant was charged with the unpremeditated murder of his eleven-month-old son. The court held that a confession by the defendant that he killed another son three years ago was admissible on the issue of intent to kill or inflict great bodily harm. "The revelations contained in the accused's confession leave little doubt that he was directly responsible for the death of [the other son]." 1 M.J. at 397.

[25]Imwinkelried, *supra* note 3, § 2:05 (footnotes omitted).

[26]*Id.*

[27]*Stokes*, 12 M.J. at 238-39.

[28]Mil. R. Evid. 404(b). analysis. "Rule 404(b). . . is substantially similar to the present Manual rule found in ¶ 138*g*." *See also Stokes*, 12 M.J. at 238-39. But it might be argued 404(b) is more expansive than the prior provision. *See Woodyard*, 16 M.J. at 718.

[29]Mil. R. Evid. 101(b).

[30]United States v. Bloom, 538 F.2d 704 (5th Cir. 1976). The panel apparently agreed that before evidence of other criminal acts is introduced against a defendant, proof of the

How can the prosecution meet this standard? The military courts do not require that the evidence of the other crime be in the form of a prior conviction. The test is whether the act plainly, clearly, and conclusively was committed by the defendant. When there is testimony by a live witness who can testify the accused was the individual who committed the uncharged misconduct, the standard is satisfied. The most difficult problems arise when the prosecution's only proof of the defendant's commission of the act is hearsay evidence. Some courts have permitted evidence by a witness testifying that unknown informants of unknown reliability had told the witness or others of the defendant's participation in criminal activity of the type being charged.[31] Others required the witness to testify from personal knowledge or from statements received from reliable informants.[32] There is no clear cut rule as to the use of hearsay evidence; many factors may be considered. When was the information obtained? Was it from an informant from the underworld or a citizen who was not from the criminal environment? Was the information self-contradictory? Is the information self-verifying or are there other facts to corroborate the information?

An unsupported statement that the defendant was a *user or pusher is not sufficient proof of uncharged misconduct to be admissible.*[33]

Likewise, when the defendant was charged with stealing money from his roommate, the court held that evidence from the roommate that he had twice before the date of the alleged offense left money on top of his dresser only to wake up and find it stolen was held to be inadmissible even though the defendant and the roommate were the only ones who had keys to the room.[34] The court implied that because these individuals may have loaned their keys to someone, plus other instances where the door may have been left open for one reason or another, the probability that the defendant committed the crime might be the same as an unknown third party committing the same crime.

"Is logically relevant"

It is not enough, however, to show that the uncharged misconduct is logically relevant.[35] Under Rule 404(b), it need not be shown to have a *substantial value* in proving a fact in issue as required in the 1969 Manual.[36] However, the evidence must be legally relevant, *i.e.*, its probative value outweighs its prejudicial effect.

"To prove a fact in issue other than the defendant's character"

Military Rule of Evidence 404(b) prohibits the prosecutor from using the evidence "to prove the character of a person in order to show that the person acted in conformity therewith."[37] Negatively, the prosecutor must articulate a theory of admissibility other than criminal propensity. Positively, the prosecutor must establish that the evidence is relevant to a consequential fact. The prosecution may be unable to show this if the defendant is willing to stipulate to a consequential fact, therefore removing it as

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similar offenses must be "plain, clear, and convincing;" the offense must not be too remote in time to the crime charged; the prior crime must relate to a material issue in the case; and there must be substantial need for the probative value of the evidence provided by the other crime.

[31]*See, e.g.*, United States v. Wolffs, 594 F.2d 77, 85 (5th Cir. 1979); United States v. Fink, 502 F.2d 1, 4-5 (5th Cir. 1974) (information was ascertained from confidential informant).

[32]United States v. Cunningham, 529 F.2d 884, 887 (6th Cir. 1976). The defendants were charged with possession with the intent to distribute marihuana. When one of the defendants took the stand, the prosecution asked a series of questions concerning previous dealings with marihuana. The court held this "cross-examination based on the [government's] reports was not proper here since the information disclosed was almost entirely based upon hearsay, suspicion, unverified sources and reliable innuendo." *Id.*

[33]United States v. Stoppenhager, 1 M.J. 547 (A.F.C.M.R. 1975).

[34]United States v. Butcher, 1 M.J. 554 (A.F.C.M.R. 1975).

[35]Mil. R. Evid. 404(b).

[36]Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 138*g* [hereinafter cited as MCM, 1969].

[37]Mil. R. Evid. 404(b).

an issue in the case.[38] The 1951 Manual rule set forth a general rule excluding all evidence of uncharged misconduct unless it fell within a few exceptions. The exceptions in the 1969 Manual were not all inclusive. In current practice, under Rule 404(b), this element of the test will be satisfied if the prosecutor can articulate any theory of relevance other than character evidence. Some traditional exceptions that have been recognized by the courts are as follows:

(1) To show knowledge. Knowledge is an essential element of such crimes as receiving stolen property, forgery, writing forged instruments, and making fraudulent entries. Suppose the defendant stands accused of receiving stolen property. The prosecution must prove that the defendant knew that the substance in his or her possession was stolen. The prosecution could introduce evidence that the defendant had purchased a number of TV sets for 10% of cost two weeks prior to the charged offense.[39]

In wrongful possession of drug cases, knowledge is not an issue unless lack of knowledge is first raised by the defense.[40] The defendant may place knowledge in issue by testifying he did not know that the substance looked like. Where the accused is charged with the possession of six plants of marihuana that had grown to about five inches in height and indicates that these plants belonged to his wife, the accused may be asked on cross-examination, "Did you know what these plants looked like?" His response might be, "No". If so, he could be asked, "Have you had any problem with marihuana offenses?" "No." Assuming the accused has, the accused could be asked, "Isn't it true that you were orally reprimanded by your company commander for possession of marihuana and a smoking pipe found in your hold baggage?" That question would be permissible not only to contradict the accused but to show knowledge under Rule 404b. Many times contradiction is intertwined with the other crimes, wrongs, or acts. But, where the defendant is charged with the wrongful possession and transfer of LSD and the defendant testifies the substance was not LSD but was in fact another prohibited substance, knowledge is not in issue.[41]

(2) To show consciousness of guilt. Certain misconduct by the defendant, such as flight from arrest or escape from confinement, may also be evidence of guilt.[42] Likewise, veiled threats to witnesses by the defendant may show consciousness of guilt.[43] The following could also be shown:

> The defendant used an alias; the defendant concealed himself; the defendant disguised himself; the defendant carried a

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[38]*See, e.g.,* United States v. DeVaughn, 611 F.2d 42 (2d Cir. 1979). It was reversible error to produce evidence that subsequent possession of heroin as relevant to identity when the defendant conceded that there was no identity issue. *See also* United States v. Foskey, 636 F.2d 517, 524 n. 5 (D.C. Cir. 1980) ("prior crimes evidence may not be introduced on issues that are not contested"). Judge Weinstein indicates that this may not be automatic where the defense counsel is trying to undercut the prosecution's case by making the case too sterile and thus out of touch with reality. J. Weinstein & M. Berger, Evidence ¶ 404(09), at pp. 404-50 to 51 (1980).

[39]Mil. R. Evid. 404(b) analysis. *See also* United States v. Petty, 3 C.M.A. 87, 11 C.M.R. 87 (1953).

[40]United States v. Carrier, 50 C.M.R. 135, 140 (A.F.C.M.R. 1975). *See also* United States v. Jones, 2 C.M.A. 80, 6 C.M.R. 80 (1952).

[41]United States vs. Anderson, 46 C.M.R. 1073 (A.F.C.M.R. 1973).

[42]United States v. Buchana, 19 C.M.A. 394, 41 C.M.R. 394 (1970). Defendant charged with robbery and assault by threatening victim with clenched fist. It was error for judge to instruct court that flight from the scene gave rise to concert of action to commit robbery. Inference as to assault not mentioned by judge, this was error despite no objection by defense counsel. Flight showed consciousness of guilt as to some offense. *See also* United States v. Alonzo, 571 F.2d 1384 (5th Cir. 1978) (evidence of flight may be relevant). *But see* United States v. Jackson, 572 F.2d 636 (7th Cir. 1978) (where the flight occurs a substantial time after the crime, it is not evidence of guilt); United States v. Harris, 6 C.M.A. 736, 21 C.M.R. 58 (1956) (in a murder case, evidence of the accused being AWOL the day following the homicide admissible).

[43]United States v. Squire, 47 C.M.R. 214 (N.C.M.R. 1973). *See also* United States v. Castillo, 615 F.2d 878 (9th Cir. 1980) (attack by accused on witness who had cooperated with police admissible); United States v. Posey, 611 F.2d 1389 (5th Cir. 1980) (attempt to bribe government official after arrest admissible).

> false identification; . . . the defendant placed false license plates on his car; the defendant forcibly resisted arrest or search; the defendant led the police on a high speed chase after the police sighted him; the day after an attempt to utter a forged instrument to a bank teller, the defendant drove off in a panic when he saw the teller; and, in some jurisdictions, the defendant attempted suicide after the crime.[44]
>
> Defense counsel should not assume that evidence of the defendant's seeming obstruction of justice is automatically admissible. There are logical and legal relevance objections available to the defense. . . . [T]his theory of logical relevance usually rests on several inferences: from the defendant's behavior to flight; from flight to consciousness of guilt; from consciousness of guilt to consciousness of guilt of the charged crime; and from consciousness of guilt of the charged crime to actual guilt of the charged crime. . . .
>
> In some cases, the defense can attack the first inference; the defense can attack the characterization of the defendant's conduct as flight. . . .
>
> The second inference may also be assailable. The courts have acknowledged that a person "may leave a jurisdiction for any number of innocent reasons."
>
> The third inference is subject to a number of attacks. Suppose, for example, that there is a substantial time lapse between the commission of the charged crime and the alleged flight.
>
> The defense will rarely be able to exclude flight evidence by attacking the fourth and last inference. . . .[45]

(3) To establish motive. The necessity for money is admissible to establish motive. Thus, if a defendant is charged with larceny or wrongful appropriation, evidence of gambling and a large number of overdrawn checks is admissible.[46] Likewise, jealously, hostility, avoiding arrest, or escaping from custody may be motive for murder or a lesser included offense. Ridiculing a defendant for misconduct may also be a motive for a crime.[47] Motive may also serve to show malice or intent or to identify the defendant as the perpetrator of another crime. It is a widely known fact that persons illegally using drugs often resort to other crimes to finance their drug purchases. Some courts are now permitting the prosecution to introduce evidence of uncharged drug abuse to prove the pecuniary motive for property crimes such as larceny or burglary.[48]

(4) To rebut defenses such as mistake, inadvertence, accident, or entrapment. Assume the defendant is charged with wrongful possession of heroin and he or she defends on the grounds of entrapment, claiming that the sale was solicited by a government agent. Evidence that on prior or subsequent recent occasions the defendant sold heroin is admissible to show that he or she was a willing participant.[49] Such evidence is not admissible unless the entrapment defense is raised[50] or defense counsel states it will be raised;[51] the prosecution is not allowed to introduce the evidence because it anticipates the defense.[52] If such a defense is not raised,

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[44]Imwinkelried, *supra* note 3, § 3:04 (footnotes omitted).

[45]*Id.*

[46]United States v. Wellers, 12 C.M.A. 262, 30 C.M.R. 262 (1961).

[47]United States v. Marshall, 2 C.M.A. 54, 6 C.M.R. 54 (1952).

[48]*See, e.g.*, United States v. Lee, 509 F.2d 400 (D.C. Cir. 1974). *But see* Gould v. State, 579 P.2d 535 (Alaska 1978).

[49]*See, e.g.*, United States v. Howard, 23 C.M.A. 187, 48 C.M.R. 939 (1974).

[50]United States v. Calhoon, 46 C.M.R. 356 (N.C.M.R. 1971).

[51]*See* United States v. Bryant, 3 M.J. 9 (C.M.A. 1977). Better practice is to wait and require introduction during the prosecution rebuttal since inadmissibility may not be cured by instructions.

[52]*See, e.g.*, United States v. Carrier, 50 C.M.R. 135 (A.F.C.M.R. 1975); United States v. Owensby, 46 C.M.R. 523 (N.C.M.R. 1972). *Compare United States v. Carrier* (the defendant was charged with violating a lawful general regulation by selling marihuana on 23 and 26 September. Over defense objection, an informant was allowed to testify that he was in the defendant's room on 19 September,

evidence of uncharged misconduct to rebut is inadmissible.[53] As to rebutting the defense, the Court of Military Appeals said, "It has been recognized that in prosecution for drug offenses, evidence of complicity and prior drug transactions is relevant to rebut the defense of a lack of criminal intent. . . . The higher degree of similarity required for the two evidentiary purposes described previously [common plan or identity] is not required here."[54]

Where the accused is charged with the sale of heroin, the defense of entrapment may be raised not only through the prosecution of the government's main witness, but also through the cross-examination of the accused. In *United States v. Fenton*[55] the case turned on the credibility of the informant. The defense adduced evidence that the informant had used drugs extensively prior to enlisting, had concealed his drug use when he enlisted, used and sold drugs in the Army, and was considered untruthful by his platoon leader. Furthermore, the platoon leader thought that the witness was under pressure to cooperate with the CID in order to avoid punishment.

In rebuttal, the prosecution called the appellant's rommmate, Howell, who testified over defense objection that he observed the appellant sell what appeared to be heroin ten to fifteen times between 5 December 1979 and 15 January 1980, and that the heroin was always hidden under the appellant's stereo system.

In cross-examination the appellant stated that the evidence by Rogers, the informant, was not true. He also stated he was not acquainted with Rogers. He denied selling drugs to Rogers on 21 August, he denied selling drugs to Rogers at any time, and, lastly, he denied selling drugs at any time at all. The last two questions by the prosecutor were over objection by the defense counsel.

The court held that the prosecutor's cross-examination of the appellant was proper and the testimony of Howell to rebut the defense was also proper. Howell's testimony tended to rebut the defense contention that Rogers was testifying falsely in an effort to avoid punishment for his own offenses. The roommate's testimony tended to show that the informant was truthful because it established that the informant had detailed knowledge of the precise location of the accused's heroin supply, which he probably would not have had if the appellant had merely ejected him from the room as testified to by the accused instead of selling him heroin. The court stated,

> There was sufficient nexus in time, place and circumstances between the offense charged and the transactions described by Howell, that his testimony was plain, clear and conclusive, and that his testimony had substantial probative value outweighing its prejudicial impact. . . . The fact that the acts described by Howell occurred after the charged offense does not make his testimony inadmissible.[56]

Evidence of sexual misconduct between defendant and the victim of an alleged assault with intent to commit sodomy is admissible when the defense of inadvertence or lack of

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when another airman entered and gave the defendant $15.00 for marihuana, at which time the defendant offered to sell the informant some marihuana. The judge instructed that the evidence was admissible on issue of knowledge. The court held the admission and instruction were error since "[t]he defense presented no evidence on the merits and limited its trial strategy to an attempt to impeach the principal Government witnesses. . . . [and] the accused's knowledge that the sbustance he sold on 23 and 26 September was marihuana and his purpose in making the sale were not placed in issue [and] the defense made no attempt to imply that the accused had an innocent purpose or to raise an affirmative defense or any other issue pertinent to the charges.") *with* United States v. Poinsett, 3 M.J. 697 (A.F.C.M.R. 1977) (defendant charged with offenses arising out of two sales to a government informant. Admissible to show attempted sale four days prior to the charged offenses as to plan or design but not to rebut defense).

[53]*See United States v. Carrier; United States v. Calhoon.*

[54]United States v. Brannan, 18 M.J. 181, 184-85 (C.M.A. 1984).

[55]CM 439559 (A.C.M.R. 21 Jan. 1981) (unpublished).

[56]*Id. See also* Thwing, *Military Rule of Evidence 404(b): An Important Weapon in the Trial Counsel's Arsenal*, nn. 20-25, in this issue of *The Army Lawyer.*

criminal purpose is raised by the defense.[57] If, however, no intent is involved in sex offense crimes, such evidence is not admissible.

Where the defense introduces "battered woman syndrome" testimony to show the reasonableness in killing the victim, it would seem that the prosecution would be allowed to introduce specific acts of misconduct to rebut the defense under Rule 404(b) if the evidence was of more probative value than probative danger.[58]

(5) To show plan or design. In *United States v. Brannan,* the court stated that in order for other instances of misconduct to be admissible to show a common scheme, plan, or design, "they must be shown to be more than similar to the charged offenses. . . . They must be almost identical to the charged acts in each (i.e., possesses a concurrence of common features), so as to naturally suggest that all these acts were results of the same plan."[59]

While intent refers to the state of mind at the time of the commission of the offense charged, plan or design points to a mental condition and antecedent to the performance of a certain act. For example, in trying to determine whether the defendant was an aider and abetter in a robbery, the court in *United States v. Hoy,*[60] stated that evidence that one hour before the alleged crime the two witnesses saw the defendant set upon an "unsuspecting individual and rendered him 'hors de combat,'" is admissible to show plan or design.[61] The same two witnesses had testified on behalf of the defendant that they committed the robbery and denied any participation by the defendant.

(6) To show identity. When identity is an issue, the accused may be identified based on similarities between the crime charged and previously committed crimes. Numerous similarities may establish identity: place, time, tools used, clothing worn, and *modus operandi.*[62] As to the latter, there is a close relationship between identity and evidence to show plan or design. When identity is not an issue because the defendant admits committing the act, then evidence of uncharged misconduct should not be admissible under *this* theory.[63] Another possible way to identify the defendant in a lar-

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[57]United States v. Marcey, 9 C.M.A. 182, 25 C.M.R. 444 (1958).

[58]*But see* State v. Kelly, 35 Crim. L. Rep. (BNA) 2331 (Wash. Sup. Ct. June 28, 1984).

[59]18 M.J. at 183. *See also* United States v. Amerine, 17 M.J. 947 (A.F.C.M.R. 1984). The accused was charged with the possession of approximately 15,000 grams of amphetamines in a conspiracy to introduce contraband into an Air Force base. The court held it was permissible to introduce evidence that six months prior to the charged offense, the accused transported a similar package between the same military installation, by the same mode of transportation. "[T]he accused's motive is shown by his acknowledgment that he had been offered $50,000 for the contents of the package shipped in June, 1984; his status as a crew member and acquaintance with Nuby and Bridgeport provided the opportunities; his involvement in a similar shipment of drugs established an awareness of how contraband can be transported; and finally the evidence made clear the accused's ability to identify narcotics. Further, in a conspiracy case, evidence tending to show the existence or an agreement or a coordinated plan is always relevant." 17 M.J. at 952.

[60]12 C.M.A. 554, 31 C.M.R. 140 (1961). *See also* United States v. Hunter, 2 C.M.A. 37, 6 C.M.R. 37 (1952) (evidence that the defendant started a fire outside the victim's house to gain entry to commit the offenses of rape, murder, and assault with a dangerous weapon); United States v. Davis, 49 C.M.R. 463 (A.C.M.R. 1974) (defendant charged with aggravated assault and premeditated murder. Defendant testified he had purchased the pistol solely for self-defense. Evidence that the defendant obtained the pistol by robbing admissible to show identity, plan, or design to commit the offenses.)

[61]*Hoy,* 12 C.M.A. at 557, 31 C.M.R. at 143.

[62]*See, e.g.,* United States v. Robinson, 560 F.2d 507 (2d Cir. 1977) (en banc) (accused carrying gun of same caliber used in bank robbery); United States v. Earherton, 519 F.2d 603 (1st Cir. 1975) (accused charged with robbery in which perpetrators used ski masks; permissible to introduce three similar ski masks and gun found in the accused's attache case upon arrest). *But see Brannan,* 18 M.J. at 184: "The common modus operandi averred was appellant's use of a brown paper sack containing plastic baggies of marijuana to distribute this drug from a motor vehicle. . . . Some question exists in our minds whether this method of distribution of marijuana is so unusual and distinctive that it is like a signature."

[63]*See, e.g.,* United States v. DeVaughn, 601 F.2d 42 (2d Cir. 1979); Lovely v. United States, 169 F.2d 386 (4th Cir. 1948). *See also* Mil. R. Evid. 403 analysis.

ceny or similar case is for the prosecution to establish the discovery of stolen party on the defendant's person or in a place under his or her control.

To prove mistaken identity, the defendant may show that other crimes similar in detail to the crime charged were committed at or about the same time by some person other than the defendant.[64]

(7) To show intent. There are both specific and general intent crimes. Examples of specific intent crimes are assault with intent to commit a specified crime, attempted larceny, wrongful appropriation, and desertion. Common crimes that do not have a specific intent are violation of lawful general regulations, possession, sale, use, or transfer of controlled substances charged under Article 112(a) UCMJ.[65]

The legal relevancy of uncharged misconduct to show intent does not depend on whether the accused denies the requisite specific intent. Where there is such a denial, however, in a pretrial statement.[66] or if presented at the trial, through cross-examintion of witnesses or through defense witnesses, evidence of uncharged misconduct may be legally relevant not only as to intent but also to rebut the defense. The prosecution may not knowingly set up a defense of lack of specific intent to seek to admit evidence of uncharged misconduct.[67]

As to general intent crimes, evidence of uncharged misconduct is not admissible unless the evidence raises lack of *mens rea*, mistake of fact, or innocent possession of a stolen item or a controlled substance. When an accused testifies that he or she did not know that concealed possession of a knife with a blade of more than three inches is a violation of a lawful general regulation, evidence of uncharged misconduct may be legally relevant. Likewise, when the defendant denies the knowing possession of a controlled substance, evidence of uncharged misconduct may be relevant not only to show intent, but also to rebut the affirmative defense raised by the defendant.

When the defendant is charged with desertion, a frequent question is whether a prior absence is admissible on the question of intent to remain away from the service permanently. It is not enough just to show a prior absence, the absence must be relevant to the charge of desertion. The factors to consider are length of the absence, the nature of the return to military control, and whether the absence took place after prior judicial action.[68]

(8) To show ability. Evidence that the defendant had a .38 caliber gun some weeks prior to the allged robbery was held to be admissible to corroborate the government's chief witness and to show an opportunity to commit the robbery.[69] When the defendant is charged with the interstate transportation of stolen postage stamps, receipt of stolen postage stamps and conspiracy, it is proper to show that the defendant knew the workings of alarm systems to show ability to commit the crime charged.[70]

(9) To show background. In *United States v. Gano*,[71] the defendant was charged with three

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[64]*See, e.g.*, United States v. O'Connor. 580 F.2d 38, 41 (2d Cir. 1978).

[65]10 U.S.C. §§ 892, 934 (1982).

[66]United States v. Marcey, 9 C.M.A. 1182, 25 C.M.R. 444 (1958).

[67]*See* United States v. Carrier, 50 C.M.R. 135 (A.F.C.M.R. 1975).

[68]United States v. Renshaw, 9 C.M.A. 52, 25 C.M.R. 314 (1958) (previous conviction for 35 minute AWOL approximately five months before the alleged desertion not admissible); United States v. Graham, 5 C.M.A. 265, 17 C.M.R. 265 (1954) (desertion—prior convictions for forty-eight day AWOL, forty-five day AWOL admissible); United States v. O'Neil, 3 C.M.A. 416, 12 C.M.R. 172 (1953) (evidence of prior absence including period spent in confinement admissible); United States v. Seekle, 45 C.M.R. 631 (A.C.M.R. 1960). *See also* United States v. Wallace, 19 C.M.A. 146, 41 C.M.R. 146 (1969); United States v. Kirby, 16 C.M.A. 517, 37 C.M.R. 137 (1964) (introduction of false draft registration card to show intent to desert); United States v. Lewis, 1 M.J. 904 (A.F.C.M.R. 1976) (desertion—evidence that defendant's absentee status discovered after his civilian arrest was held inadmissible).

[69]United States v. Robinson, 560 F.2d 507 (2d Cir. 1977) (en banc).

[70]United States v. Barrett, 539 F.2d 244 (1st Cir. 1976).

[71]560 F.2d 990 (10th Cir. 1977). *See also* United States v. Gibson, 625 F.2d 887 (9th Cir. 1980). Where an accused was

counts of carnal knowledge with a female under sixteen years of age. The prosecution was allowed to introduce evidence that the defendant had sexual relations with the wife of a patient and subsequently with her underaged daughter, and that he had sold marihuana to the mother and daughter to lower the resistance of the daughter. In *United States v. DeVincent*,[72] the defendant was charged with conspiring to make and making extortionate extensions of credit. The court held that evidence of a twenty-year-old conviction for armed robbery and a ten-year-old murder indictment were admissible. The court stated that it had "qualms still, for this testimony was remote and cumulative. . . but the [trial] court, under these circumstances, may have reasoned that the testimony making these matters remote and cumulative also reduced their prejudicial impact."[73]

The traditional formulation of the doctrine is a general rule of exclusion with a few exceptions. A second test for the admissibility of uncharged misconduct is a rule of inclusion employed in a number of courts.[74] Arguably, there is little difference between the rules, because in exclusionary jurisdictions the court usually accepts the prosecution's characterization of the evidence.[75] Under the inclusionary test, evidence of uncharged misconduct is admissible if it is relevant to any issue other than the defendant's propensity to commit a crime. As stated by the Fourth Circuit, "Evidence of other offenses may be received, if relevant for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime."[76] Under this view, the prosecution can satisfy this element of the foundation by articulating any theory of relevancy other than character evidence.

"Outweighs the evidence's prejudicial character."

Under the substantive rule, the need to show that the evidence is "logically relevant" to establish a fact in issue other than defendant's character and that the probative value "outweighs the evidence's prejudicial character" are closely related. The Court of Military Appeals might apply some of the same factors mentioned in *United States v. Weaver*,[77] as to when the prosecution may impeach the defendant by use of a prior conviction. There are four factors that may be considered in determining whether the evidence has substantial probative value which outweighs its prejudicial effect.

The first factor is nexus to the crime charged. In *United States v. Janis*,[78] the court stated, "[T]here must exist a nexus in time, place, and circumstance between the offense charged and the uncharged misconduct sought to be intro-

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charged with kidnapping, evidence that he committed a sexual assault on the victim was admissible to present the whole picture surrounding the crime.

[72]546 F.2d 452, 457 (1st Cir. 1976). *See also* United States v. Serlin, 538 F.2d 737 (7th Cir. 1976). Evidence of a prior fraud scheme was admissible to show that the government witness was the "set-up" person for the defendant in luring new customers ot the defendant to carry out the alleged offense of mail fraud.

[73]*United States v. DeVincent*, 546 F.2d at 457.

[74]United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978). The court stated it followed an "inclusionary" approach while recognizing the need for balancing probative value against prejudicial effect. It concluded that the "draftsmen of Rule 404(b). . . . intended to emphasize admissibility of 'other crimes' evidence." United States v. Benedetto, 57 F.2d 1246, 1248-50 (2d Cir. 1978). The court noted that it favored an "inclusionary" approach toward uncharged misconduct but noted the dangers of such evidence.

[75]R. Lempert & S. Saltzburg, A Modern Approach to Evidence 210-11 (2d ed. 1977).

[76]United States v. Woods, 484 F.2d 127, 134 (4th Cir. 1973).

[77]1 M.J. 111, 117-18 (C.M.A. 1975). "[T]he factors which we believe must be taken into account by a military judge in weighing the probative value of a previous conviction vis a vis its prejudicial effect are the nature of the conviction itself in terms of its bearing on veracity, its age, its propensity to influence the minds of the jury improperly, the necessity of the testimony of the accused in the interests of justice, and the circumstances of trial in which the prior conviction is sought to be introduced."

[78]1 M.J. 395 (C.M.A. 1976). *See* United States v. Conrad, 15 C.M.A. 439, 35 C.M.R. 411 (1965). *See also* United States v. Hinote, 1 M.J. 776 (A.F.C.M.R. 1976). The defendant was charged with incest with a daughter. The court held that the daughter's testimony concerning incest six years earlier was too remote in time to have any value to prove the accused's mental disposition to commit the offense.

duced."[79] Assume that the prosecution relies on exception number (4) above to rebut an entrapment defense in a drug prosecution. Evidence of a similar, voluntary drug sale by the defendant prior to the charged crime would be logically relevant to rebut the defense.[80] However, if the prior sale was remote in time, that is, if a very substantial period of time had elapsed between the prior sale and the charged sale, the judge could exclude the evidence on the ground that it lacks substantial value.

The nexus does not have to be great when there is a continuing course of conduct. In *United States v. Anderson*,[81] the accused was charged with two specifications of taking indecent liberties with a female under sixteen years of age. The victims of the charged offenses were neighbor girls who in each instance were spending the night with the accused's young stepdaughters. During the case-in-chief, the prosecution attempted to introduce evidence of the accused's attempted exposition that the acts were an accident and of the repeated touchings of the two stepdaughters on their upper legs and buttocks over a period of years, from seven years to one year prior to the incident. The court held that the misconduct met the Janis standard:

> The offenses were similar in nature and occurred in the appellant's home. Although the attempted act of intercourse with his young step-daughter seven years previously would be too remote, standing alone, as part of a course of molestation that continued through the year prior to this incident, the time link was satisfied.[82]

As another example, assume that the prosecution relies on the motive exception when the defendant is charged with larceny. Evidence of black market activities and wrongful possession of ration cards would establish a motive, *i.e.*, need for money, but these offenses are so dissimilar to the crime charged as to create a risk that the prejudicial effect would outweigh the probative value of the evidence.[83] As another example, assume that the prosecution relies on exception (6) to identify the defendant. Connecting the defendant with any uncharged crime with a similar motive would be logically relevant. However, realizing how prejudicial uncharged misconduct is, the courts ordinarily

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[79]*Janis*, 1 M.J. at 397 (three years not too remote). *See also* United States v. Hancock, 14 M.J. 999 (A.C.M.R. 1982). The accused was charged with committing an indecent assault on a female patient while conducting a physical exam. The court held that it was error to admit evidence that the accused was charged in May 1977 for rape which was later amended to assault.

[80]United States v. Howard, 23 C.M.A. 187, 48 C.M.R. 939 (1974). Approximately two months earlier not too remote. The fact that the uncharged crime occurred after rather than before the charged crime does not affect admissibility. *See* United States v. Alston, 460 F.2d 48, 55 (5th Cir. 1972) (two sales of heroin introduced, one twenty-five days before and another four days after offense charged); United States v. James, 5 M.J. 382 (C.M.A. 1978); *see also* United States v. Pollard, 509 F.2d 601, 604 (5th Cir. 1975) (robbery charged allegedly occurred in Georgia, proper to introduce evidence of robberies a few months later in California).

Cf. United States v. Teeter, 16 M.J. 68, 71 (C.M.A. 1983): "Admittedly, most of appellant's statements . . . preceded the commission of the offenses by several months, some even by a year or so. Nevertheless, appellant's prior involvement with the devil, particularly as it related to women, was corroborative of appellant's statement. . . . In short, we are satisfied that the evidence was probative of appellant's motive, intent, or state of mind. The military judge obviously balanced the probative value of the evidence against the danger of unfair prejudice to appellant, and we cannot say that he abused his discretion." There is a wealth of authority announcing that subsequent acts are inadmissible to prove the defendant's intent, knowledge, or motive. Imwinkelried, *supra* note 3, § 2:11 (footnote omitted).

[81]9 M.J. 530 (A.C.M.R. 1980). *See also* United States v. Clark, 15 M.J. 974 (A.C.M.R. 1983). The accused was charged with three specifications of rape of his daughter during three periods of time. The issue was whether uncharged acts of misconduct were admissible to show lack of consent by the daughter when the first acts with her father occurred when she was approximately seven years old. The court stated, "A combination of sexual abuse during her early years and the continuing pattern of sexual behavior at home rendered Susan incapable of consenting to the charged acts." 15 M.J. at 976. It went on to state, "[It] is precisely the ancient vintage of the acts, occurring at such a tender age and the continuing pattern of behavior, that makes the evidence especially relevant and probative." *Id.* at 977.

[82]9 M.J. at 533.

[83]United States v. Hill, 9 C.M.A. 10, 25 C.M.R. 272 (1958).

require a very high degree of similarity and motives between the charged crime and the uncharged act. Thus, if the motives were similar but not strikingly similar, the judge again might well exclude the evidence as lacking substantial probative value.

The second factor is whether the fact the prosecution proposes to use the evidence to prove an essential element of the crime or merely an intermediate fact in the case. This may be the factor of "integrity and fairness" mentioned in *Janis*.[84] In exceptions (1), (6), and (7), the facts the evidence is offered to prove usually coincide with essential elements of the charged crime. Under other exceptions, the evidence is not directly relevant to an element of the crime, but instead it performs an intermediate step from which the jury can reason that the defendant committed a particular act. If the evidence goes to such an intermediate step, the court may apply a stricter standard of probative value than that used when the evidence concerns an element of the crime charged.[85]

The third factor is whether the prosecution has available alternative evidence to prove the fact. This again may relate to the "integrity and fairness" prerequisite of *Janis* and is analogous to the "necessity for the testimony of the accused, in the interest of justice" factors in *Weaver*. As the court stated in *James*, "Judicial discretion must be exercised in determining whether the danger of undue prejudice outweighs the probative value of the evidence, taken always in the context of the availability of other means of proof."[86] Suppose that the prosecution offers the evidence under exception (6) to prove identity. Assume further that the prosecution has a wealth of eyewitness testimony that the defendant was the perpetrator or could easily obtain such.[87] One court has stated that uncharged misconduct may not be admitted to prove identity because of similar *modus operandi* unless there is a great degree of similarity between the charged crime and evidence introduced.[88] The trial judge may exclude the uncharged misconduct evidence on the ground that it is cumulative. Some courts have held that the trial judge should not admit other evidence if the offense can be proven as well by other competent evidence.[89] Also, courts have stated that when the prosecution has proven its case to the "hilt," other evidence of misconduct is inadmissible.[90]

In theory the rule makes sense, but it is very difficult to decide when the prosecution has proven the case to the "hilt." Those who are familiar with jury trials never know what result they will achieve. As one lawyer was heard to remark, "If you knew the thinking of the jury you would find a new profession." Certainly, in deciding whether the evidence should be admitted, it is wise to wait until after the defense case. Most trial judges will tell you that offers of proof are always from the perspective of the individual making the offer. It is much better to make the determination as to these factors after the evidence has been admitted subject to cross-

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[84]*Janis*, 1 M.J. at 397, *see also* United States v. Weaver, 1 M.J. 111 (C.M.A. 1975).

[85]*See, e.g.*, United States v. Shepherd, 9 C.M.A. 90, 25 C.M.R. 352 (1958). Charged with false official statement, evidence that the defendant had disobeyed order to submit statement not admissible.

[86]United States v. James, 5 M.J. 382, 383 (C.M.A. 1978). *See also* United States v. McFadyen-Snider, 552 F.2d 1178, 1184 (6th Cir. 1977). The evidence was "not necessary to prove the prosecution's case."

[87]United States v. Cook, 557 F.2d 1149 (5th Cir. 1977). The court stated there was no need to introduce the documents that the appellants had disobeyed injunctive orders since there was already oral testimony. The conviction was reversed. *Cf.* United States v. Dawkins, 2 M.J. 898 (A.C.M.R. 1976). Acquittal order could be used to identify the accused in a solicitation of perjury case were the accused claimed "he had been there before but was lucky."

[88]United States v. Myers, 550 F.2d 1036, 1045 (5th Cir. 1977). "[T]hey must possess a common feature or features. . . . The more unique each of the common features is, the smaller the number that is required for the probative value of the evidence to be significant."

[89]C. McCormick, Handbook of the Law of Evidence 453 n. 56 (2d ed. 1972).

[90]People v. Perez, 42 Cal. App. 3d 760, 117 Cal. Rptr. 195 (1974); Banks v. State, 298 So.2d 543 (Fla. App. 1974) (no need for "over-kill").

examination by both sides. "Deferral to rebuttal will often not solve the problem since the defendant may not present any evidence."[91]

The fourth situation is the most troublesome. On the one hand, the defendant neither pleads guilty nor offers to stipulate to the fact the prosecution is offering its evidence to prove. On the other hand, the defense does not present any evidence to affirmatively controvert the fact. May evidence of uncharged misconduct be introduced? Some commentators[92] and courts[93] have applied a "necessity" test. The question being whether the prosecution needs the evidence to prove its case beyond a reasonable doubt. This test assumes one will know when the evidence is sufficient to convince the jury. This assumption is wrong since a jury may acquit when the lawyers feel that the case is overwhelming. Because of the practical rather than theoretical difficulties in applying this test, it should generally be eliminated.

II. Procedure

Procedurally, many issues arise. First, when should the judge rule on the admissibility of uncharged misconduct if a motion *in limine* is made? Second, should the judge or court-members determine the existence of the facts under the substantive doctrine? Third, what are the rules if the uncharged act is part of the accused's confession? Fourth, what instructions should be given?

Motions in limine

The trial judge must be very cautious as to the introduction of uncharged acts of misconduct by the prosecution. If the evidence is determined on appeal to have been erroneously admitted because the evidence's probative value does not outweigh the evidence's prejudicial character, there may be reversible error. The issue may be raised by way of objection or by a motion *in limine*. The judge has various options. First, the judge may indicate to counsel he or she will consider this evidence after the prosecution has rested its case-in-chief and the defense has either not put on a case or has completed its case.[94] When the judge denies the motion *in limine*, he or she should tell the defense they may raise the issue again when the evidence has been introduced. Once this advice is given, the defense is on notice to renew the objection; the failure to renew the objection may very well be a waiver.[95] If the defense rests

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[91]Weinstein & Berger, *supra* note 36, at 404-52.

[92]Chestnut, *The Admissibility of Other Crimes in Texas*, 50 Tex. L. Rev. 1409 (1972).

[93]United States v. Mahar, 519 F.2d 1272 (6th Cir. 1975); People v. Guzman, 47 Cal. App. 3d 380, 121 Cal. Rptr. 69 (1975).

[94]*Cf.* New Jersey v. Portash, 440 U.S. 450 (1979). Because of *Portash*, trial judges would be well advised to delay any ruling until the appropriate time. The Court held that immunized testimony may not be used for impeachment. When the trial judge rules that it can be used and the defendant does not testify, the effect is a violation of the fifth amendment. *Portash* was a 7-2 decision with four judges filing concurring opinions and two justices, the Chief Justice and Justice Blackmun, dissenting. In a concurring opinion by Justice Powell, in which Justice Rehnquist concurred, he stated: "The preferred method for raising claims such as Portash's would be for the defendant to take the stand and appeal a subsequent conviction, if—following a claim of immunity—the prosecutor were allowed to use immunized testimony for impeachment. Only in this way may the claim be presented to a reviewing court in a concrete factual context. Moreover, requiring that the claim be presented only by those who have taken the stand will prevent defendants with no real intention of testifying from creating artificial constitutional challenges to their convictions." *Id.* at 462.

In United States v. Kelly, 4 M.J. 845 (A.C.M.R. 1978), the court held that it was not an abuse of discretion for the judge to delay ruling on a statement that the defendant claims to be illegally obtained and thus not available for impeachment by the prosecution. *See also* United States v. Benedetto, 571 F.2d 1246, 1249 (2d Cir 1978), "[W]e have emphasized that admission of such strongly prejudicial evidence should normally await the conclusion of the defendant's case since the court will then be in the best position to balance the probative worth of, and the government's need for such testimony. . . ."

[95]United States v. Thomas, 11 M.J. 388, 392 (C.M.A. 1981), "In denying the motion *in limine*, the military judge had placed defense counsel on notice to renew his objection to this evidence when it was offered; so the failure of the defense to object to Cullen's (witness as to misconduct) testimony that his own wallet had been taken—or to move that this testimony be stricken—waived any objection to admissibility." *See also* United States v. Brannan, 18 M.J. 181 (C.M.A. 1984), where the court relied on the fact the defense counsel did not renew his objection even though the trial judge stated he would rule on any objection as to witnesses' testimony at the time of the testimony.

without putting on any case, the military judge may allow the prosecution to reopen its case.

The second option is a procedure suggested by Judge Jones. He stated that in a jury trial it would be better for the evidence to be "tentatively" admitted.[96] Following this suggestion, the evidence will be admitted at an Article 39(a), UCMJ, session. Counsel will be informed that they will be permitted to present the evidence to the jury later in the trial. This will permit the trial judge to determine if the act was plainly, clearly, and conclusively committed by the defendant, is logically relevant to prove a fact in issue other than the accused's character, and that the need for uncharged misconduct evidence outweighs its prejudicial character. If the evidence was admitted as part of the prosecution's case-in-chief and later was determined to be inadmissible, the jury would be instructed to disregard the evidence. This raises the question of the value of such an instruction. Because it may be tough to "rebag the cat after it is out," the tentative admission before an Article 39(a), UCMJ, session would alleviate the problem of limiting instructions but raise others such as admissions of evidence based on offers of proof.[97]

Determining the existence of admissibility under substantive doctrine

The trial judge should determine whether the evidence should be received.

> Many respected commentators believe that the prevailing practice in the United States is to allow the trial judge to finally decide the fact. Louisell and Mueller declare that (c)learly the question whether evidence of other offenses should be received pursuant to Rule 404(b) should be resolved by the trial judge alone under Rule 104(a) and should not be a shared responsibility of judge and jury under Rule 104(b)." Wright and Graham concur; they add that "it seems very doubtful that (the Advisory Committee) intended the admissibility of other crimes evidence to be determined by the jury under Rule 104(b)."
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> . . . .
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> It may still be the majority practice to allow the trial judge to finally decide the issue of the defendant's identity as the actor, but the trend appears to be toward the view that Rule 104(b) governs this issue. Under this view, the judge admits the plaintiff's or prosecutor's evidence so long as the evidence creates a permissive inference of the defendant's identity; the defendant presents the rebuttal evidence to the jury; and on request, the judge instructs the jury to finally decide the question before considering the evidence as proof of liability or guilt during their deliberations.[98]

Confession

What if the act of misconduct is contained in a statement of the accused which sets forth a defense to the crime charged and the prosecution seeks to introduce the statement? Paragraph 140*a*(5) of the 1969 Manual stated:

> The rule requiring independent corroborating evidence also does not apply to statements made prior to or contemporaneously with the act, nor does it apply to statements which are admissible to prove the truth of the matters stated under some rule of evidence other than that pertaining to the admissibility of confessions and admissions.[99]

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[96]United States v. Anderson, 9 M.J. 530 (A.C.M.R. 1980).

[97]*Cf.* Bruton v. United States, 391 U.S. 123 (1968). The Court held that jury instructions to disregard a confession of a co-accused were not sufficient when the co-accused did not take the stand, thus violating the accused's right of confrontation. Although the language was quite broad, there have been a number of exceptions carved out. *See e.g.*, Randolph v. Parker, 442 U.S. 62 (1979); Nelson v. O'Neil, 402 U.S. 622 (1971).

[98]Imwinkelried, *supra* note 3, § 2:06 (footnotes omitted).

[99]MCM, 1969, para. 104*a*(5). That last clause means that if the statement of the accused is admitted under another exception of the hearsay rule, there is no need for corroboration to insure its trustworthiness. *See* United States v. Villasenor, 6 C.M.A. 3, 19 C.M.R. 129 (1955). Interpreting paragraph 140*c* of the 1951 Manual, the court held that the

In an interpretation of this rule, it was held that there did not have to be corroboration of a statement by the accused offered by the prosecution which sets forth uncharged misconduct of the accused. "The purpose of the rule, as variously stated by the courts and legal writers, is to prevent an accused from being *convicted* on an untrue confession to a nonexistent offense, or at least to one he did not commit.[100]

Instructions

Another procedural aspect of the rule is the question of instructions. Prior to the new rules, the trial judge was required to instruct the court members *sua sponte* that evidence of misconduct was admitted under paragraph 138*g* of the Manual for a limited purpose.[101] Rule 105[102] overrules the case law requiring the military judge to instruct *sua sponte*.[103] Rule 105 places the responsibility for trial tactics on the defense counsel. In *United States v. Wray* the court stated:

> Indeed, in cases like the one at hand, there is no reason for adhering to the anomaly of finding error when the military judge follows the request of defense counsel in omitting an instruction on a collateral matter. In view of the defense counsel's responsibilities—assuming even minimal competency on the part of the defense counsel—his tactical choice can appropriately be honored by the military judge. This is especially true where, as here, the defense counsel's stated determination is one for which a rational basis can readily be perceived.[104]

In note 2, the court emphasized that the "duty to properly instruct the court member does not belong to counsel but always remains with the trial judge."[105] "In like manner, we held that although the military judge would not have erred in giving a limited instruction on uncharged misconduct over the objection of defense counsel, compliance with the defense request also did not constitute error."[106] There are many positions between the defense counsel making tactical decisions and the final responsibility placed on the trial judge. Absent an express waiver where the failure to give the instruction would be plain error, the obligation will still be on the judge. When the defense counsel does not request an instruction and there would not be plain error, the allegation on appeal will be that defense counsel was incompetent. To avoid these two harms, the trial judge should as a matter of routine ask defense counsel if they would like the instruction. If not, have defense counsel to state the tactical reasons on the record. If the judge does not agree with these reasons or feels that the purpose of the evidence must be explained to the court members, the trial judge may give the instruction over objection. If the Court of Military Appeals does not accept the waiver concept in Rule 105 when there has been no express waiver, other rules will apply when the judge has not followed the aforementioned suggestion.

An instruction as the limited admissibility of uncharged misconduct is not required *sua sponte* where the evidence of a prior conviction was admitted to rebut the accused's testimony that he or she never possessed marihuana or

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corroboration rule did not apply as to a notation on an envelope by the accused when the envelope was properly admitted as a business entry. Thus, *Villasenor* is cited as an example of the meaning of the last clause in paragraph 140*a*(5) of the revised 1969 Manual. Dep't of Army, Pamphlet No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States, 1969, Revised Edition, p. 27-10 (July 1970). Mil. R. Evid. 304(g) has a rule similar to the 1969 Manual.

[100]United States v. Anderson, 9 M.J. 530, 533 (A.C.M.R. 1980).

[101]*See, e.g.*, United States v. Grunden, 2 M.J. 116 (C.M.A. 1977).

[102]Mil. R. Evid. 105.

[103]*Id.* analysis. *See also* United States v. Fowler, 9 M.J. 149, 150-51 n. 3 (C.M.A. 1980): "Rule 105. . . remove[s] the sua sponte responsibility of the military judge to instruct on uncharged misconduct, except when failing to instruct would constitute plain error under Rule 103(d)."

[104]9 M.J. 361, 362-63 (C.M.A. 1980) (footnote 2 omitted, but part is cited in text above).

[105]*Id.* at 362n.2.

[106]*Id.* at 363.

was admitted to impeach the accused's credibility.[107] The instruction is also not required where the uncharged misconduct:

was so intermingled with the crime charged as to be imseparable;[108]

occurred immediately prior to, with, or after the acts charged;[109]

was impossible to avoid in testimony;[110]

was part of the charges; or[111]

showed *res gestae*.[112]

The difficulty in applying these decisions in the last five footnotes as to exceptions is another reason for the tactical decision to be knowingly made by defense counsel who is able to assess the demeanor of the witnesses and the court members.[113] Absent incompetence or plain error, this decison will be respected by the appellate courts. Of course, the prosecutor may ask for the instruction to focus on the purpose of the introduction of the evidence. At the trial level, the final decision will be made by the trial judge.

[107]United States v. DeFord, 5 M.J. 104 (C.M.A. 1978).

[108]United States v. Tobin, 17 C.M.A. 625, 38 C.M.R. 423 (1968) (Ferguson, J.); United States v. Corley, 5 M.J. 558 (A.C.M.R. 1978); United States v. Daniels, 37 C.M.R. 878 (A.F.B.R. 1967).

[109]United States v. James, 5 M.J. 382, 383 (C.M.A. 1978) (Cook, J., concurring). "Some acts have meaning only when they are placed in the fabric of the completed crime. These acts evidence no general predisposition to commit arson offenses." *See also* United States v. Daniels, 37 C.M.R. 878 (A.F.B.R. 1967).

[110]*United States v. Daniels.*

[111]*See* United States v. Fowler, 9 M.J. 149 (C.M.A. 1980). In dictum, the court said that the instruction was not required where the uncharged misconduct was a threat to cut the throat of another which led to the search incident to an apprehension in which the drugs the accused was charged with possessing were discovered. There was an express waiver of the instruction. *See also* United States v. Tobin, 17 C.M.A. 625, 38 C.M.R. 423 (1968).

[112]United States v. Montgomery, 5 M.J. 832 (A.C.M.R. 1978).

[113]*See* opinions of Judge Cook in United States v. Fowler, 9 M.J. 149 (C.M.A. 1980); United States v. James, 5 M.J. 382 (C.M.A. 1978).

Drunk Driving: The Army's Mandatory Administrative Sanctions

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I. Introduction

Drunk driving, whether attributed to alcohol or other drugs, is a national social problem and, unfortunately, the Army has not been spared this calamity. For instance, 19,000 soldiers were arrested for driving under the influence (DUI) from February 1983 to February 1984; 19,000 soldiers were hurt in accidents connected with drinking; 8,000 more were hurt in accidents involving drugs; and 22,000 soldiers caused injury to others or damage to property as a result of alcohol or other drugs.[1] This is a tremendous loss of personnel and property, a loss the Army can ill-afford. It also reflects adversely on the readiness of the military. These joint concerns led to a tightening of our drug and alcohol policies in 1983.

The Army's current approach to this national problem is use of mandatory and discretionary administrative sanctions. In October 1983, the effective date of interim change I04 to Army Regulation 190-5,[2] the Army initiated two mandatory actions—withdrawal of driving

[1]Handout, U.S. Army Safety Center, The Alcohol and Accident Guide (Feb. 1984).

[2]Dep't of Army, Reg. No. 190-5, Motor Vehicle Traffic Supervision (1 Aug. 1973, C4, 27 July 1983) [hereinafter cited as AR 190-5].

privileges and the general officer letter of reprimand. Implementation of these sanctions caused a number of initial problems for installation commanders and their respective staff judge advocates (SJA). This article will review the general nature of the required sanctions, point out how various posts in CONUS, Korea and Germany have implemented them, and discuss some of the questions most asked concerning these sanctions.

II. Withdrawal of Driving Privileges

Operation of privately-owned motor vehicles on a military installation constitutes a conditional privilege extended to certain individuals by the installation commander. Those who desire to partake of this privilege must meet several conditions, including compliance with the laws and regulations governing motor vehicle operation, requirements for installation registration (if required), proof of vehicle ownership or state registration, a valid record of motor vehicle safety inspection (if required), and maintaining a valid state driver's license. However, the conditions do not stop here as far as military personnel are concerned. They must also attend, if ordered to attend, remedial driver training or participate in an alcohol or other drug rehabilitation program.[3]

The Department of Defense (DOD) and Department of the Army (DA) policies[4] can be summed up by stating that drunk driving is incompatible with military service. Accordingly, commanders are directed to apply appropriate sanctions for drunk driving, including the withdrawal of driving privileges. DOD Directive 1010.7 directs that all military departments will establish procedures for mandatory suspension of driving privileges on military installations and in areas subject to military traffic supervision for driving while intoxicated. AR 190-5 prescribes procedures for suspension and revocation of driving privileges regardless of the geographic location of the drunk driving incident. The following will detail the applicable Army procedures.

A. Immediate Suspension Pending Resolution of Drunk Driving Charges

To whom does this apply? It applies to active duty Army personnel, their dependents, DA civilian employees and others with installation driving privileges. Suspension is also authorized for civilians not associated with the military but only with respect to incidents occurring on a military installation or areas subject to military traffic supervision.[5]

After a drunk driving incident, the best evidence readily available will be presented to the installation commander's designee for review and, if appropriate, immediate suspension of the individual's driving privileges. The designee/reviewer should be an officer not associated with an installation law enforcement agency. For instance, at Fort Jackson, South Carolina, and III Corps, Fort Hood, Texas, the chief of administrative law performs this function. On the other hand, at Fort Bragg, North Carolina, the assistant deputy post commander acts on the installation commander's behalf,

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[3] *Id.* at para. 2-1.

[4] Dep't of Defense, Dir. No. 1010.7, Drunk and Drugged Driving by DOD Personnel, para. D1 (10 Aug. 1983) [hereinafter cited as DOD Directive 1010.7]:

> Intoxicated driving is incompatible with the maintenance of high standards of performance, military discipline, DOD personnel reliability, and readiness of military units and supporting activities. It is DOD policy to reduce significantly the incidence of intoxicated driving within the Department of Defense through a coordinated program of education, identification, law enforcement, and treatment. Specifically, the goal of the DOD Intoxicated Driving Prevention Program is to reduce the number of fatalities and injuries suffered by DOD personnel and the amount of property damage that resulted from intoxicated driving. Persons who engage in intoxicating driving, regardless of the geographic location of the incident have demonstrated a serious disregard for the safety of themselves and others. It is appropriate for military commanders in the exercise of their inherent authority, to protect the mission of an installation and the safety of persons and property therein to restrict driving privileges of persons who engage in such actions.

AR 190-5, para. 1-3c: "Intoxicated driving is incompatible with the maintenance of high standards of performance, military discipline, and readiness, and is a serious threat to the health and welfare of the Army Community. . . ."

[5] AR 190-5, para. 2-2a(2).

and at the U.S. Army Garrison, Yongsan, Korea, it is the deputy installation commander. Our military forces in Germany are controlled not only by AR 190-5 but also by USAREUR Reg. 190-1[6] which provides for a "suspending authority"[7] or "revoking authority"[8] to take action in incidents involving drunk driving. The provost marshal (PM) can be given suspension authority in cases where the usual designated reviewer is unavailable and such action is immediately necessary. Review by the usual designated officer, however, will follow as soon as possible if the PM acts. "When a suspension notice is based on the Provost Marshal's review, there is no requirement for a confirmation notice following the subsequent review by the designated officer."[9]

Often a question arises as to what is the best evidence. Examples include sworn witness statements, military or civilian police reports, chemical test results, refusal to consent or complete chemical testing, videotapes, statements by the apprehended individual, and field sobriety test results. Evidence need only be of sufficient detail to be reliable to be considered. However, for example, "suspensions for off-post offenses should not be based on published lists of arrested persons, statements by parties not witnessing the apprehension, telephone conversations, or other information not supported by documented reliable evidence."[10]

The designated officer/reviewer will normally conduct a review within twelve hours after assembly of the evidence[11] to determine if any of the following three circumstances have occurred:

1. Lawful apprehension for drunk driving.

2. Refusal to take or complete a lawfully requested chemical test for blood alcohol content.

3. Driving or being in physical control of a motor vehicle on-post when blood alcohol content is 0.10 percent or higher, irrespective of other charges; or off-post when blood alcohol content exceeds applicable state standard, irrespective of other charges.[12]

If the evidence supports any of these three acts, the individual will immediately have his or her installation driving privileges suspended. This is done *ex parte* and is designed to be accomplished quickly to protect both the individual and the public. Due process is injected principally at the hearing stage.

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[6]USAREUR Reg. No. 190-1, License To Operate And Registration of Privately Owned Motor Vehicles (1 July 1977). A new USAREUR Reg. 190-1 has been drafted to supersede the present regulation.

[7]*Id.* at Explanation of Terms. Suspending Authority is a "commander or supervisor immediately superior to the licensee in the chain of command or supervision or any commissioned officer designated in writing by a commander in grade 0-4 or above to act as the suspending authority for a particular unit, organization, or readily defineable group of individuals. . . ."

[8]*Id.* at Explanation of Terms. Revoking Authority is a "commissioned officer, in grade 0-4 or above, or civilian supervisor of equivalent grade, next above the suspending authority in the chain of command or supervision of the licensee. If a commander has designated a suspending authority for a unit, organization, or group of individuals, he/she will be the revoking authority for licensees under the control of the designated suspending authority. . . ."

[9]*Id.* at para. 2-2*d*(1)

[10]AR 190-5, para. 2-2*d*(1).

[11]*Id.* Suspension can result immediately if the arresting military police officer determines that the driver of a stopped motor vehicle is too impaired to be allowed behind the wheel.

[12]*Id.* at para. 2-2*a*. Installations have to pay particular attention to cases involving the violation of state standards because in some states a person can be convicted of driving under the influence with less than a 0.10 percent blood alcohol content. For example, in Colorado, "[i]f there was at such time in excess of 0.05 but less than 0.10 grams of alcohol per one hundred milliliters of blood as shown by chemical analysis of such person's blood or if there was at such time in excess of 0.05 but less than 0.10 grams of alcohol per two hundred and ten liters of breath as shown by chemical analysis of such person's breath, such fact shall give rise to the presumption that the defendant's ability to operate a vehicle was impaired by the consumption of alcohol, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol." Colo. Rev. Stat. § 42-4-1202 (1983).

B. Limited Hearing

Active duty personnel must receive written notice of suspension without delay, normally through their unit chain of command (see Appendix A). For civilian personnel, registered mail is used; however, civilians employed on an installation can receive the written notice through their military or civilian supervisor.[13]

Suspension is effective upon receipt of the notice, but notification of suspension is not all the notice contains. Notice letters should contain additional information about how the suspension may turn into a revocation of driving privileges and an explanation as to how revocation can occur. The individual should be told of the right to request, in writing, a limited hearing before the installation commander or his designee to determine if on-post driving privileges will be restored pending resolution of the charge. Such a request has to be made within five working days after receipt of the notice.[14]

Who are the installation commander's designees that will act as limited hearing officers? AR 190-5 does not say who these personnel are and installations vary widely in practice. At Fort Jackson, for example, the limited hearing officer is the Plans and Operations officer (0-4) under the Directorate of Personnel and Community Activities (DPCA). At Fort Hood, due to the size of the installation, major subordinate commands submit a list of officers (majors and lieutenant colonels) to the adjutant general, who compiles a master list and turns it over to the provost marshal. Two to three officers are selected to serve for a period of approximately ninety days. In Korea, at the U.S. Army Garrison in Yongsan, a board of three officers conducts such a hearing. The deputy post commander (0-6) conducts the limited hearing at Fort Bragg, and in Germany the previously mentioned revoking or suspending authorities act as the decision maker. At a minimum, the same set of qualifications used to select and appoint Article 32 investigating officers should apply to these selections.

While DOD Directive 1010.7 provides that the individual may be represented by counsel at his or her own expense,[15] AR 190-5 is silent as to this. Appearance of counsel at a limited hearing has been left up to the individual installations.[16] DA civilians can bring a personal representative with them to the limited hearing in accordance with applicable laws and regulations.[17] If a hearing is requested, it will be conducted within ten working days of receipt of the request. The suspension will remain in effect until a decision has been made by the limited hearing officer. The suspension, however, will not exceed seven working days after the hearing while awaiting the decision. If there is no decision rendered at that time, full driving privileges will be restored until such time as the individual is notified of a decision to continue the suspension.[18]

AR 190-5, para. 2-2*d*(4) requires the limited hearing officer to examine five questions. A favorable finding for the individual on any of the questions should result in restoration of full driving privileges pending the outcome of the charge. The questions are—

1. Did the law enforcement official have reasonable grounds to believe the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor?
2. Was the apprehension lawful?

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[13] *Id.* at para. 2-2*d*(1)(a) & (b). Written acknowledgement of receipt should be required if this latter method is used to notify civilian employees to insure that they receive the suspension letter.

[14] *Id.* DOD Directive 1010.7 states that the individual's written notice will include the arrest report or other documentation relied on to take immediate suspension action.

[15] DOD Directive 1010.7, para. E2*a*(4). The drafters of interim change 4 to AR 190-5 intended that counsel not be present at these limited hearings. Do not forget that AR 190-5 was drafted before the DOD Directive.

[16] *E.g.,* at Fort Jackson, South Carolina, and Fort Hood, Texas, civilian counsel is allowed but military counsel are not. The limited hearing officer determines to what extent the civilian counsel participates in the hearing.

[17] AR 190-5, para, 2-2*d*(2)(c).

[18] *Id.* at para. 2-2*d*(3).

3. Was the person lawfully requested to submit to a blood alcohol content test and informed of the consequences of refusal to take or complete such test (unless incapable of refusing, *e.g.*, . . . unconscious or otherwise in a condition rendering him or her incapable of refusal)?

4. Did the person refuse to submit to the blood alcohol content test, or fail to complete the test, or submit to the test and the result was 0.10 percent or higher blood alcohol content for on-post apprehension, or in violation of state laws for an off-post apprehension?[19]

5. Was the testing method used valid and reliable and the results accurately evaluated?[20]

Normally, a military police officer gains "reasonable cause" to believe an individual was driving under the influence through personal observation of unusual, abnormal, or illegal driving behavior. The driver is stopped, and through additional personal observation, *e.g.*, physical appearance of the driver, slurred speech, alcohol on the breath or erratic movements, the investigating officer determines the person's ability to drive is impaired. The driver is then required to take a field sobriety test to check the extent of any suspected impairment and to determine if a blood alcohol test is called for. A voluntary breath or bodily fluid test is based on the military implied consent requirement.[21] The individual is warned that failure to voluntarily submit to or complete a requested chemical test could result in revocation of his or her installation driving privilege.[22] These drivers do not have the right to consult with or have an attorney present before stating whether they will take such a test nor during administration of the test.[23]

The installation commander determines the type of test to be administered on the installation. For instance, at Fort Jackson, Fort Hood, and Fort Bragg, the breathalizer/intoxilyzer is used most often for traffic incidents involving suspected drunk driving through abuse of alcohol, and they usually use a blood test when other drugs are suspected. On the other hand, in Korea the Army uses the blood test exclusively; only the Korean police use the breathalizer.

No test will be given to an individual who refuses to take a blood alcohol content test, with one major exception.

> Any individual subject to the Uniform Code of Military Justice who was driving a motor vehicle involved in an accident resulting in *death, personal injury,* or *property damage*, may be subjected to a nonconsental blood (or bodily fluid) extraction test for the presence of intoxicants only when there is probable cause to believe that such an individual was driving or in control of a vehicle while under the influence of an intoxicant.[24]

Authorization to search must be gained under

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[19]*See id.* at para. 4-5*e*.

> If there was at that time 0.05 percent or less by weight of alcohol in the person's blood, it shall be presumed that the person was not under the influence of intoxicating liquor. If there was at that time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, such fact shall not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor. If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor.

[20]*Id.* at para. 2-2*d*(4).

[21]*Id.* at para. 2-1*e*.

[22]*Id.* at para. 4-5*c*.

[23]*See* South Dakota v. Neville, 459 U.S. 552 (1983); Schmerber v. California, 384 U.S. 757 (1966); Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983); United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980); AR 190-5, para. 4-5*c*(3)(b).

[24]AR 190-5, para 4-5*c*(4)(a)(i).

Military Rule of Evidence 315[25] prior to such nonconsentual extraction unless "there is a clear indication that evidence of intoxication will be found, and there is good reason to believe the delay which would result if an authorization were sought could result in the destruction of such evidence."[26]

If the limited hearing officer decides all five issues against the individual, the suspension should remain in effect until resolution of the pending charges. Further, if the hearing officer determines that the individual refused to take or failed to complete a blood alcohol content test, the individual's driving privilege can be revoked for one year. This action can be taken regardless of the outcome of the pending drunk driving charge.[27]

C. Revocation of Driving Privileges

Revocation of an individual's driving privilege is always a severe sanction, and, when it involves drunk driving, the period of revocation is one year. Such a revocation will occur in the following circumstances.

1. When the installation commander or his designee has determined that the person lawfully apprehended for driving while intoxicated/drunk driving refused to submit to or complete a test to measure blood alcohol content required by the law of the jurisdiction, this regulation, or installation traffic codes.[28] Or,
2. When there has been a conviction, nonjudicial punishment, or administrative determination in civilian channels[29] for drunk driving (for example, suspension or revocation of driver's license). Appropriate official documentation of such a conviction, etc., is required as the basis for revocation.[30]

Usually the limited hearing officer also acts as the revocation authority; however, this is not mandatory. Fort Bragg's revocation authority is an assistant adjutant general—a first lieutenant.[31]

The period of revocation will run from the date the original suspension was imposed, excluding any period during which full driving privileges may have been restored pending resolution of charges.[32] A revocation for a minimum of five years will be imposed if an individual is apprehended while driving on the installation while a suspension or revocation is in effect. Also, "for each subsequent determination within a five-year period that revocation is authorized. . ., the offender will be prohibited

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[25]"An 'authorization to search' is an express permission, written or oral, issued by competent military authority to search a person or an area for specific property or evidence or for a specific person and to seize such property, evidence or person." Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 315(b)(1).

[26]"The commander of a medical facility, or his delegatee, is empowered by Mil. R. Evid. 315(d), to authorize such extraction from an individual situated in that facility at the time the authorization is sought. . . . Authorization should not, however, be sought from the commander or his delegate unless efforts to obtain authorization from a military judge or other appropriate commander prove unsuccessful due to unavailability of such officials." AR 190-5, para. 4-5*c*(4)(a)(i)(ii). *Contra* United Sates v. Kalschever, 11 M.J. 373 C.C.M.A. 1983) (authority to authorize searches may not be delegated).

[27]DOD Directive 1010.7, para. E2(c). The individual will, in the written notice, be informed of the right to request a hearing and "that the suspension will be for one year if a hearing is not requested."

[28]Ar 190-5, para. 2-2*b*(c)(a).

[29]DAJA/AL 1984/2472, 30 July 1984. There is a proposed change to DOD Directive 1010.7 to allow "a military administrative determination" within the listing of judicial and nonjudicial actions which may serve as a predicate to suspension of installation driving privileges.

[30]AR 190-5, para. 2-2*b*(3)(b).

[31]This is entirely permissible since the assistant AG officer has no discretion; this officer sends the appropriate revocation notice to the individual and nothing more.

[32]AR 190-5, para. 2-2*b*(4). Example: "Privileges were initially suspended on 1 January 1984 for a charge of drunk driving with a blood alcohol content of 0.14 percent. A hearing was held, extreme family hardship was substantiated, and privileges restored on 1 February 1984 pending resolution of the charge. On 1 March there was a conviction for drunk driving. The mandatory one-year revocation period will consist of January 1984 plus March 1984 through February 1985, for a total of 12 months with no installation driving privileges."

from obtaining or using a U.S. Government Motor Vehicle Operator's Identification Card (SF-46) for a minimum of six months."[33]

D. Restricted Privileges

All is not lost, however, for the individual who finds him or herself on the receiving end of a suspension or revocation and needs to drive to get to work. Such individuals can request restricted driving privileges at any time, *e.g.*, after imposition of the initial suspension, after the limited hearing or after revocation goes into effect. "The general courts-martial convening authority will act upon all requests for restricted driving privileges subsequent to a suspension or revocation of installation driving privileges for apprehension or conviction for drunk driving."[34]

The general court-martial convening authority may consider and grant requests for restricted driving privileges in several instances: "to preclude adverse military mission impact, severe family hardship, or [a] detrimental effect on ongoing or contemplated alcohol or drug treatment and rehabilitation programs involving the affected individual."[35] No restricted privileges will be given to any person whose driver's license has been suspended or revoked by a state, federal or host country civil court or agency. The limits of the restricted privilege will be specified in writing to the individual concerned, *e.g.*, to and from work, commissary or hospital. When revocation becomes effective, however, it cancels any restricted driving privileges that may have been granted pending resolution of the charge. The individual may reapply for new restricted privileges, but full driving privileges will not be restored.[36]

From time to time, a question is asked concerning the treatment of civilian employees. Should we act differently towards them because they are civilian employees? AR 190-5's sanction of withdrawing driving privileges applies equally to service members and DA civilians. However, since DA civilian adverse actions are controlled by the Civil Service Reform Act, all actions should be taken in conjunction with the CPO. This is particularly true where a full suspension or revocation could result in loss of employment. A recommended approach to drunk driving by a DA civilian is first to give a limited suspension/revocation that restricts driving on the installation to the most direct route to and from the place of employment (if the employee demonstrates that the suspension/revocation would constructively remove him from his or her employment).[37] Second, offer the Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) services to the employee. This gives him or her a chance at rehabilitation, and, if we later have to take an adverse personnel action, it refutes any argument the employee might make that the Army did nothing to help him or her overcome the problem.[38] It puts the Army in the position to argue effectively that the civilian employee was given a chance to rehabilitate him or herself and declined to do so (assuming the civilian employee refused such an offer) or failed the rehabilitation program. In addition, the civilian employee should be counseled that such conduct in the future will not be tolerated, and it should be pointed out that subsequent drunk or drugged driving offenses could result in a loss of

[33] *Id.* at para. 2-2*b*(5)(6).

[34] *Id.* at para. 2-2*c*(1). The requirement that the general court-martial convening authority act as decision maker is more stringent than DOD Directive 1010.7 which does not specify who will act as the decision maker. The installation commander will act on non-drunk driving cases.

[35] *Id.* at para. 2-2*c*(2).

[36] *Id.* at para. 2-2*d*(6).

[37] *Id.* at para. 2-2*c*(4).

[38] In order to afford reasonable accommodation to an employee who is handicapped by alcoholism, an agency must offer the employee rehabilitative assistance and allow him an opportunity to take such leave for treatment, if necessary, before initiating any disciplinary action for continuing performance or misconduct problems related to his alcoholism. Ruzek v. General Service Administration, 7 M.S.P.B. 307, 81 F.L.M.R. 7060 (1981). Federal agencies are required to make reasonable accommodation for qualified handicapped employees (which may include an alcoholic) unless it can show that the requested reasonable accommodation of the handicapped would cause undue hardship. 29 U.S.C. § 791 (1982), 5 U.S.C. § 7203 (1982), Federal Personnel Manual, Supp. 792-2, subch. 51-2(a) (Feb. 29, 1980).

all installation driving privileges which could affect his or her employment. Such counseling should be annotated on the employee record card, Standard Form 7-B. These written counseling statements become a permanent part of the employee's Standard Form 7-B as long as the employee is employed at the installation and can subsequently be used to support more severe forms of discipline, if necessary. Be advised, however, that employees in a collective bargaining unit, who are represented by a union, may also have broad appeal rights under negotiated grievance procedures in the local collective bargaining agreement.

E. Restoration of Driving Privileges

If the individual's pending drunk driving charge results in acquittal,[39] his or her installation driving privileges will be restored, with two major exceptions.

> Acquittal of drunk driving charges will not result in vacation of any suspension or revocation of driving privileges when such action was based on either (1) refusal to take or complete a lawfully requested test to measure blood alcohol content, after being informed of the consequences of refusal of such a test, or (2) the person driving or being in physical control of a motor vehicle while suspension or revocation was in effect.[40]

In these cases the individual has to reapply for driving privileges.

An individual may not be out of the woods even if acquitted of a drunk driving charge and seeking to have his or her installation driving privileges restored. There are additional requirements placed on these persons. For instance,

> Active duty Army personnel apprehended for drunk driving, on or off the installation, will be referred to the local Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) for evaluation within seven working days to determine if the individual is dependent on alcohol or other drugs, and for enrollment in Track 1 or other appropriate track. For problem drinking and alcoholism among Federal civilian employees. . . [s]upervisors of civilian employees apprehended for drunk driving will advise employees of ADAPCP services available.
>
> Installation driving privileges of any person who refuses to submit to or fails to complete chemical testing for blood alcohol content when apprehended for drunk driving or convicted for other [drunk driving] offenses will not be reinstated unless the person successfully completes either an alcohol education and treatment program sponsored by the installation, state, county, municipality, *etc.*, or private program evaluated as acceptable by the installation ADAPCP. That person must also be evaluated by installation alcohol treatment/rehabilitation authorities as sufficiently rehabilitated to no longer pose a high safety risk on the highways. Driving privileges will not be reinstated before the expiration of a mandatory revocation period except as determined by the General Court-Martial Convening Authority.[41]

The administrative sanctions for drunk driving do not stop with withdrawal of installation driving privileges, referral to ADAPCP, completion of an alcohol education and treatment program, and evaluation as not being a high safety risk on the highway. The service member also faces the possibility of a general officer letter of reprimand being filed in his or her military personnel file.

III. General Officer Letter of Reprimand

The general officer letter of reprimand is the second mandatory adverse action taken against active duty Army personnel. This sanction is

[39]Acquittal also includes any other determination which sets aside a finding of "guilty" or a determination by appropriate officials not to prosecute the charge.

[40]AR 190-5, para. 2-2*e*(1)(2).

[41]*Id.* at para. 4-5*f*.

not in any DOD Directive; it is found in AR 190-5, para. 4-5(h)[42] as an action to be taken against drunk drivers. AR 190-5 directs that a general officer will give an administrative letter of reprimand for any of the following three acts:

1. Conviction of driving while intoxicated/drunk driving either on or off the installation.
2. Refusal to take or failure to complete a lawfully requested test to measure blood alcohol content, either on or off the installation, when there is substantial evidence of drunk driving. [Or,]
3. Driving or being in physical control of a motor vehicle on-post when blood alcohol content is 0.10 percent or higher, irrespective of other charges; or off-post when blood alcohol content is in violation of state laws, irrespective of other charges.[43]

Recall that these are the same circumstances that result in an immediate suspension of an individual's installation driving privileges. "Subsequent filing of the letter will be in accordance with the provisions of AR 600-37."[44] The most asked question regarding this letter of reprimand is who can actually sign the letter. It must be a general officer with only one minor exception: a frocked brigadier general is authorized to issue and direct filing of all letters of reprimand.[45] A senior general officer may authorize a lower ranking general to handle such sanctions or, perhaps, the senior general officer will reserve a certain category of soldiers, *e.g.*, all officers, for his or her action. The next most asked question is, "Where is the letter filed?" It can be filed in the Military Personnel Records Jacket (MPRJ) or in the Official Military Personnel File (OMPF).[46] A common misperception is that these letters can be filed in the restricted part of the fiche. This is not correct. Another question often asked is whether a general officer can elect not to file a letter of reprimand initiated for drunk driving. This remains a valid option for the general officer; however, general officers should be stopped from using a "desk-drawer" letter of reprimand because it is not in compliance with AR 600-37.[47] If the general officer chooses not to file it in one of the military personnel files, the service member concerned should be notified. A sample general officer letter of reprimand is at Appendix B.

IV. Conclusion

The withdrawal of installation driving privileges and the general officer letter of reprimand are mandatory adminsitrative sanctions for drunk driving and represent two approaches the Army has taken to "crack-down" on drunk or drugged driving world-wide. Judge advocates will find themselves involved in a variety of ways, *e.g.*, advisors to commanders, suspension authorities for suspension of driving privileges, drafters and/or reviewers of general officer letters of reprimand for drunk driving, or advisors to service members who are the recipients of these adverse administrative sanctions. Whatever your role, you must be knowledgeable in these areas to effectively handle problems that arise involving soldiers and drunk driving.

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[42] *Id.* at para. 4-5*h*.

[43] *Id.* at para. 4-5*h*(1)(a), (b) & (c).

[44] *Id.* at para. 4-5*h*(1).

[45] Message, DAPE-HRL, 161430Z Aug 84, subject: DWI Letters of Reprimand.

[46] Dep't of Army, Reg. No. 600-37, Unfavorable Information, ch. 2 (15 Nov. 1980).

[47] "AR 600-37 implicitly restricts the practice of issuing a so called 'desk drawer letter of reprimand' without referring it to the member and forwarding it for a filing determination." Digest of DAJA-AL 1983/1143, The Army Lawyer, Nov. 1983, 30, at 31.

Appendix A

DEPARTMENT OF THE ARMY
11TH INFANTRY DIVISION AND FORT ARLINGTON
FORT ARLINGTON, VIRGINIA 11111

ABCD-JA-AL 2 August 1984

SUBJECT: Suspension of Post Driving Privileges

THRU: Commander
1st Brigade, 11th Infantry Division
Fort Arlington, Virginia 11111

Commander
2d Battalion, 1st Brigade, 11th Infantry Division
Fort Arlington, Virginia 11111

Commander
Company A, 2d Battalion, 1st Brigade, 11th Infantry Division
Fort Arlington, Virginia 11111

TO: 1LT Gideon Pillow
Company A, 2d Battalion, 1st Brigade, 11th Infantry Division
Fort Arlington, Virginia 11111

1. You are hereby notified that effective upon receipt of this letter, your post driving privileges are suspended under the provisions of AR 190-5, paragraph 2-2*a*(2), due to your arrest on Fort Arlington, at 2200 hours, 1 August 1984, for the offense of Driving Under the Influence.

2. This suspension will remain in effect until the driving under the influence charges against you have been adjudicated. If you are determined to be guilty of the offense, your post driving privileges may be revoked for a period of one year in accordance with AR 190-5, para. 2-2*b*(3).

3. If you are acquitted of the charges against you, the suspension will remain in effect until such time as you make an application for re-registration in accordance with AR 190-5, para. 2-2*e*.

4. You have the right to request a hearing to determine if your post driving privileges should be restored pending the resolution of driving under the influence charge. Your request must be made in writing, within five working days of this notice, to the Commanding General, ATTN: ABCD-PA-PO, Fort Arlington, Virginia 11111.

ABCD-JA-AL 2 August 1984
SUBJECT: Suspension of Post Driving Privileges

5. Please be advised that if you are apprehended driving a vehicle while you are still under suspension, additional action to revoke your driving privileges for up to five years may be taken against you.

I.M. JUDGE
Major, JAGC
Chief, Administrative and
Civil Law

CF:
PMO, Traffic Section
Commanding General, ATTN: ABCD-PA-PO
Magistrate Court Clerk

Appendix B

Department of the Army
11th Infantry Division and Fort Arlington
Fort Arlington, Virginia 11111

ABCD-EF-G

1 October 1984

SUBJECT: Administrative Letter of Reprimand UP AR 600-37

1LT Gideon Pillow
Company A,
2d Battalion, 1st Brigade, 11th Infantry Division
Fort Arlington, Virginia 11111

1. It has been reported to me that on 1 August 1984 you were apprehended driving your privately owned vehicle on Fort Arlington at approximately 2200. The arresting officer cited you for driving under the influence of intoxicating liquor. Subsequently, on 3 September 1984, you were convicted of that offense after a trial on the merits in the Federal Magistrate's Court on Fort Arlington. For your conduct I hereby reprimand you.

2. Your conduct on 1 August 1984 demonstrated a serious disregard for your own safety and that of others, and raises graves doubt as to whether you can perform your duties. Your lack of judgment in this incident calls into question whether you deserve the special trust and confidence which the President of the United States has reposed in you as a commissioned officer. From this day forward I charge you to conduct yourself in a manner that is recognized as worthy of an officer in the United States Army.

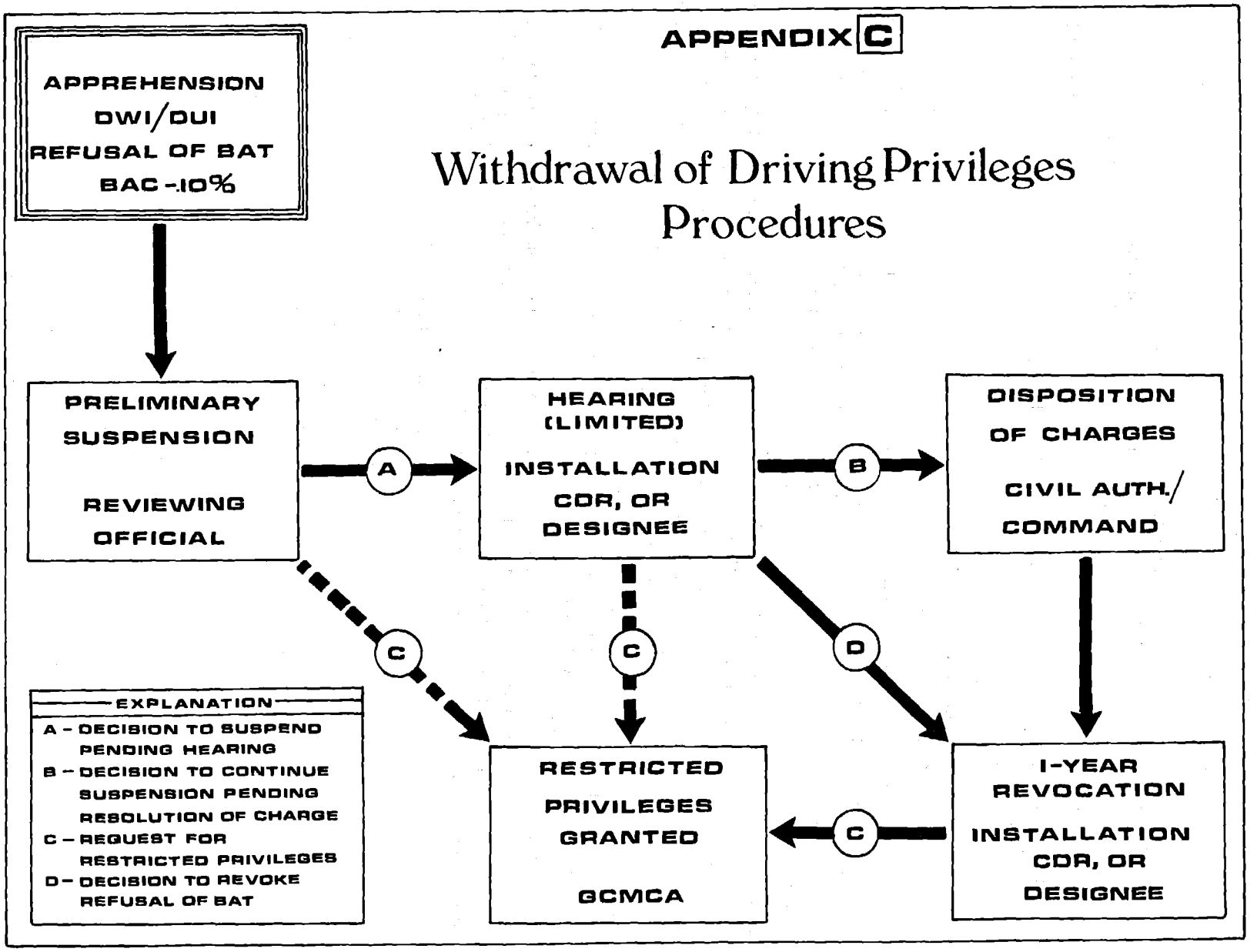
3. This is an administrative letter of reprimand imposed under the provisions of AR 600-37 and not as punishment under Article 15, UCMJ.

4. I intend to file this letter in your Official Military Personnel File. You have seven working days from the receipt of this letter to submit matters in rebuttal or on your behalf. Your response, if any, should be by indorsement to this letter. I will withhold my decision on imposing and filing this letter until I receive and consider any response you may make.

Richard J. Halftrack
Major General, USA
Commanding

APPENDIX C

Withdrawal of Driving Privileges Procedures



The Competition in Contracting Act of 1984

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and

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Introduction

The Competition in Contracting Act of 1984 (CICA)[1] extensively amended the Armed Services Procurement Act[2] and the Federal Property and Administrative Services Act.[3] The amendments concern two major areas: bid protest procedures and competition in the contracting process. These amendments must be implemented on fairly short notice. The bid protest procedures apply to all protests filed on or after 15 January 1985.[4] The amendments pertaining to competition apply to all solicitations issued on or after 1 April 1985.[5]

This article will review the significant CICA changes as they apply to acquisitions under the Armed Services Procurement Act. It will discuss some of the issues which may arise during implementation. Proposed resolutions of these issues are offered for consideration in the absence of subsequent regulatory guidance.

Amendments Pertaining to Competition

Definitions

There is some new terminology which must be digested prior to discussing the amendments pertaining to competition.

1. *Competitive procedures* are those permitting *full and open competition.*[6]

2. *Full and open competition* means that all responsible sources are permitted to submit *sealed bids* or *competitive proposals.*[7]

3. *Sealed bids* is a new term which changes the name but not the methods of formal advertising.

4. *Competitive proposals* is a new term which refers to competitive acquisition by negotiation.

5. *Other than competitive procedures*[8] are any procedures in which *full and open competition* is not permitted.

Competitive Procedures

Formal advertising and the seventeen negotiation exceptions will become history on 1 April 1985. In their place we will find a bifurcated system consisting of *competitive procedures* and *other than competitive procedures.* Under this system primary importance is placed upon competition; it is no longer placed on the method of acquisition. Whether competition is obtained through the use of *sealed bids* (formal advertising) or *competitive proposals* (negotiation) is of secondary importance. This change is illustrated by the diagram at the Appendix.

What is the significance of this change? It is probably more academic than practical. The pre-CICA procurement system required maximum practicable competition even when nego-

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[1]Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (to be codified at 10 U.S.C. §§ 2301-2306, 31 U.S.C. §§ 3551-556, 40 U.S.C. § 759(h), 41 U.S.C. §§ 253, 254) [hereinafter cited as CICA].

[2]10 U.S.C. §§ 2301-2316 (1982).

[3]41 U.S.C. §§ 251-260 (1982).

[4]CICA § 2751(b).

[5]CICA § 2751(a).

[6]CICA § 2731.

[7]*Id.*

[8]*Other than competitive procedures* include not only sole source but also procedures in which some, but not all, sources are excluded. Therefore, either sealed bids or competitive proposals may be appropriate.

tiation procedures were used.[9] Therefore, an increase in competition in government contracting as a result of this change is unlikely.

Competitive Procedures Excluding Sources

Competitive procedures generally include only those in which all sources may participate. However, two limited exceptions are established by the Act. Procedures where competition is restricted to fulfill statutory requirements relating to small businesses[10] or where a particular source is excluded to establish or maintain alternative sources are also considered to be competitive.[11] Any other exclusion of sources results in the procedures being *other than competitive* and is permissible only if it falls within the circumstances specified by the Act. The limitation of the power to restrict competition in only these two situations appears to be an oversight. For instance, although the Federal Acquisition Regulation (FAR) includes Labor Surplus Area Set Asides in this category,[12] the Act does not.

Additionally, there are no provisions for excluding sources on the basis of organizational conflicts of interest. Under current practice these sources are excluded by means of contractual provisions.[13] Because the Act permits exclusion of sources only in specified instances, there is some question concerning the continued legitimacy of this practice. There is, of course, no question that such sources should logically be excluded from bidding to protect the government's interests. One method of accomplishing this exclusion would be to obtain a determination by the Assistant Secretary of the Army for Research, Development and Acquisition that exclusion is in the public interest.[14] This method, however, has the dual disadvantages of the long lead time to obtain the determination and at least thirty days notice to Congress prior to award of the contract.[15]

An alternate basis for excluding sources because of organizational conflicts of interests lies in the definition of "responsible source." One of the elements of responsibility is that the source "is otherwise qualified and eligible to receive an award under applicable laws and regulations."[16] Although the organizational conflict of interests provisions do not automatically exclude sources,[17] it can be argued that a contractual exclusion based on these provisions is a determination that the source "is [not] otherwise qualified and eligible to receive an award under applicable laws and regulation," and hence is not a responsible source. The requirement for *full and open competition* is met if all responsible sources are permitted to compete.[18] Thus, the source with the conflicting interests may be excluded without preventing *full and open competition.*

Sealed Bidding

The differences between sealed bidding and formal advertising are cosmetic; neither the Act nor the FAR include significant substantive changes. A preference for sealed bids is continued.[19] Solicitation of sealed bids is mandatory where (1) time permits, (2) award will be made on the basis of price and price-related factors, (3) discussions are not necessary, and (4) there is a reasonable expectation of obtaining more than one sealed bid.[20]

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[9]10 U.S.C. § 2305(a) (1982); Federal Acquisition Regulation (FAR) 15.105.

[10]CICA § 2723(b)(1).

[11]CICA § 2723(a)(1).

[12]FAR 6.203 (proposed under letter, General Services Administration, 1 Oct. 1984, subject: Proposed revision to the Federal Acquisition Regulation (FAR) to implement the Competition in Contracting Act of 1984 [hereinafter cited as (proposed)]).

[13]FAR 9.507, 9.508.

[14]CICA § 2723(a)(1). The Act provides that the head of an agency will make this determination. It is assumed that the Assistant Secretary of the Army (Research, Development and Acquisition) will make these determinations.

[15]CICA § 2723(4)(1).

[16]CICA § 2722.

[17]*See* FAR 9.507, 9.508.

[18]CICA § 2722.

[19]CICA § 2723(a)(1).

[20]*Id.*

Competitive Proposals—Negotiation

The Act recognizes negotiation as a legitimate competitive procurement procedure. Under current practice, using negotiation requires a determination and finding justifying negotiation under one of the seventeen statutory exceptions to Formal Advertising. Under the Act, negotiation is an alternate procedure which may be used if sealed bids are not appropriate.[21] There is no requirement to document the inappropriateness of sealed bidding. This requirement was intentionally omitted from the Act. In fact, it was viewed as lifting "a great administrative burden off the shoulders of the executive agencies."[22] Notwithstanding that intention, it would seem advisable to document the contracting officer's decision to use competitive negotiation because of the express criteria mandating the use of sealed bidding. The administrative burden associated with this practice appears to have been greatly overestimated.

Other Than Competitive Procedures

The Act and part 6 of the FAR contain several provisions intended to restrict the use of *other than full and open competitive procedures*, including limiting use of these other procedures to specific instances, requiring specific justification, requiring approvals, and appointing an advocate for competition in each procuring activity.

For ease of reference, *other than full and open competitive procedures* will be referred to as "noncompetitive procedures" in this discussion. This shorthand term should not obscure the fact that the Act's restrictions apply to acquisitions limiting the number of competitors as well as those in which only one source is solicited.[23]

Circumstances Permitting the Use of Noncompetitive Procedures

Noncompetitive procedures may be used only in seven circumstances:

(1) Only one responsible source can meet agency needs;

(2) Unusual and compelling urgency;

(3) When necessary to maintain a supplier in case of national emergency or industrial mobilization or to maintain essential research capability;

(4) When precluded by the terms of an international agreement;

(5) Authorized or required by statute;

(6) When required by National Security; or

(7) When the agency head determines it to be in the public interest.[24]

The sense of *déjà vu* this list evokes is attributable to the similarity, if not identity, of six of these circumstances to six of the seventeen exceptions currently permitting negotiation. The seventh exception appears to cover, at least, the former exceptions concerning standardization of technical equipment[25] and technical supplies requiring substantial initial investment.[26]

With regard to the urgency exception, it should be noted tht the Act specifically prohibits the use of noncompetitive procedures based upon the lack of advanced planning or the amount of funds available for procurement function.[27] This clearly excludes justifications based upon the pending expiration of availability of funds at fiscal year end.[28] The urgency exception is intended to apply to situations in which there is a threat of immediate harm to health, welfare, or safety.[29]

The similarity between the provisions permitting noncompetitive procedures under the Act and the former exceptions permitting negotia-

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[21] *Id.*

[22] S. Rep. No. 50, 98th Cong., 2d Sess. 18 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 1480, 1497.

[23] CICA § 2723(a)(1).

[24] *Id.*

[25] 10 U.S.C. § 2304(a)(13) (1982).

[26] 10 U.S.C. § 2304(a)(14) (1982).

[27] CICA § 2723(a)(1).

[28] S. Rep. No. 50, 98th Cong., 2d Sess. 12 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 1480, 1491.

[29] S. Rep. No. 50, 98th Cong., 2d Sess. 21 (1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News, 1480, 1500.

tion may result in a predisposition to use negotiation in noncompetitive acquisitions. However, the FAR provides that either sealed bids *or* negotiation may be used.[30] The seven exceptions pertain only to the limitation of competition; they do not pertain to the method of acquisition to be used. While the FAR does not specifically address the issue, it seems that there is still a preference for sealed bids. Negotiation should be used only when soliciting sealed bids has been determined to be inappropriate under the criteria established by the Act.

Justification of Noncompetitive Procedures

The contracting officer must prepare written justification for the use of noncompetitive procedures.[31] Additionally, he must certify the accuracy and completeness of the justification.[32] This justification must include the following elements:

(1) A description of agency needs;

(2) Identification of the statutory exception permitting noncompetitive procedures and the reasons for using the exception;

(3) A determination that the anticipated cost will be fair and reasonable;

(4) A description of the market survey conducted or reasons for not conducting a survey;

(5) A listing of sources that expressed, in writing, an interest in the acquisition; and

(6) A statement of any actions taken to remove any barrier to competition before a subsequent procurement.[33]

The FAR also requires a description of the efforts made to insure that offers are solicited from as many potential sources as is practicable and any other facts supporting the use of noncompetitive procedures.[34] This justification must be specifically identified as "justification for other than full and open competition."[35]

The Act specifically provides that the justification and *any related documentation* shall be made available for inspection consistent with the Freedom of Information Act.[36] This would appear to require the disclosure of the government cost estimate as well as identification of potential bidders. Because the Act does not explicitly provide for protection of this information during the acquisition process, it can reasonably be expected that a vendor participating in a limited competition might request access to this information. It is also likely that requests for cost estimates will occur in sole source acquisitions. In such instances, access to this related documentation could be denied during the acquisition process under Exemption 5.[37]

Aside from the cost determination and the list of sources, the justification will probably include no exempt information. In fact, the reasons justifying the use of noncompetitive procedures must be included in a Commerce Business Daily notice.[38] Therefore, it appears that the justification, except items (3) and (5), would normally be released.

Approval Requirements

The Act establishes three approval thresholds; a fourth is added by the FAR. Justification for proposed contracts exceeding $10,000,000 must be approved by the Assistant Secretary of the Army for Research, Development and Acquisition.[39] For proposed contracts between $1,000,000 and $10,000,000, the ap-

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[30]FAR 6.401 (proposed).

[31]CICA § 2723(a)(1).

[32]*Id.*

[33]*Id.*

[34]FAR 6.303-2 (proposed).

[35]FAR 6.303-2(a)(1) (proposed).

[36]CICA § 2723(a)(1).

[37]5 U.S.C. § 552(b)(5) (1982). *See also* Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979).

[38]CICA § 2732(a).

[39]CICA § 2723(a)(1). Assistant Secretaries of the Army have been designated the "Head of an agency" by the Office of Federal Procurement Policy. 41 C.F.R. § 1-1.204 (1984). It is

proval of the head of the contracting activity is required.[40] The competition advocate will act as approval authority for proposed contracts between $100,000 and $1,000,000.[41] For proposed contracts under $100,000, the FAR requires approval at a level higher than the contracting officer.[42]

A question raised by the Act is whether options exercised under existing noncompetitive contracts require approval. The FAR appears to have answered this question in the affirmative by requiring that the exercise of an option be in accordance with part 6.[43] Therefore, prior to exercising an option under a noncompetitively awarded contract, the contracting officer will have to prepare a justification and obtain the required approval.

Neither the Act nor the FAR provides any guidance concerning whether the value of options should be included in determining the contract amount. Generally an option is viewed as separate from the contract created under it.[44] Therefore, a determination to base the approval level on the amount of the award would be legally supportable. This approach is also consistent with the contracting officer's obligation to ensure that the exercise of the option will be in accordance with part 6 and will otherwise be the most advantageous method of fulfilling the government's needs.[45]

The Competition Advocate

The Act requires each contracting activity to appoint a competition advocate.[46] In addition to approving justifications, the competition advocate's responsibilities include promoting full and open competition, challenging barriers to competition (such as restrictive specifications) and requirements to prepare reports concerning actions and circumstances affecting competition.[47] The competition advocate may not be assigned other duties which are inconsistent with these.[48]

Differences of opinion can be expected to arise between the contracting officer and the competition advocate. Neither the Act nor the FAR provides that the competition advocate's determination is final. Therefore, it seems that some procedure must be established which is analogous to that established for resolving differences of opinion between the contracting officer and legal counsel.[49] The most probable procedure would be appeal to the next higher approval authority.

Specifications

As a part of its emphasis on maximizing competition, the Competition in Contracting Act requires each agency to develop specifications to permit full and open competition and to limit restrictive provisions only to the extent necessary to satisfy the minimum needs of the agency.[50] The Act establishes three types of specifications: functional, performance, and design. The type of specification used will depend on the agency's needs and the market available to satisfy those needs.[51]

A solicitation will include, in addition to specifications, a statement of all significant factors, including price, which the agency reasonably expects to consider in evaluation. The solicitation must also state the relative order of importance of each factor.[52] In the case of sealed bids, the solicitation must contain, as a minimum: "a statement that sealed bids will be eval-

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assumed that this function will be fulfilled by the Assistant Secretary of the Army (Research, Development and Acquisition).

[40]CICA § 2723(a)(1).

[41]*Id.*

[42]FAR 6.304(a)(1) (proposed).

[43]FAR 17.207(b) (proposed).

[44]S. Williston, A. Treatise on the Law of Contracts § 61A (3d ed. 1957).

[45]FAR 17.207(c) (proposed).

[46]CICA § 2732(a).

[47]*Id.*

[48]*Id.*

[49]Army FAR Supplement 1.697(2)(c).

[50]CICA § 2723.

[51]*Id.*

[52]*Id.*

uated without discussions with the bidders; and the time and place for opening of the sealed bids."[53] In the case of competitive proposals/ negotiation, the solicitation must contain, as a minimum: "a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors; and the time and place for submission of proposals."[54]

Cost and Pricing Data

Currently, defense contractors are required by statute to submit cost or pricing data and to certify that the data is accurate, complete, and current for negotiated contracts over $500,000.[55] Also the FAR requires contractors to submit this data for contracts negotiated by civilian agencies.[56] The Competition in Contracting Act extends the statutory requirement found in the Armed Services Procurement Act to civilian acquisitions under the Federal Property and Administrative Services Act and establishes a uniform threshhold in both statutes at $100,000.[57] The Act requires that a contractor submit certified cost or pricing data—

(1) Before award of any negotiated prime contract expected to exceed $100,000;

(2) Before the pricing of any contract modification, if the price adjustment is expected to exceed $100,000;

(3) Before the award of a subcontract at any tier, when the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $100,000;

(4) Before the pricing of any contract modification to a subcontract covered in clause (3), if the price adjustment is expected to exceed $100,000.[58]

Bid Protest Procedures

GAO Bid Protest Procedures

Historically, the General Accounting Office (GAO, also known as the Comptroller General) had no direct statutory authority to review bid protests from unsuccessful offerors. Yet, the GAO received thousands of protests each year. The GAO first entered the bid protest arena to fill the vacuum left by the refusal of the courts to hear bid protest cases.[59] The Comptroller General stepped in to fill this void, citing as authority the Budget and Accounting Act of 1921,[60] which provides that all claims and demands against the United States will be settled and adjusted by the GAO. With the passage of the CICA, the GAO now has specific statutory authority to perform its bid protest function.

The CICA defines protest as: "A written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such contract."[61] This definition is adopted verbatim in the FAR.[62] As a result, an oral protest may no longer be acceptable. The pre-CICA bid protest regulations did not define the term "interested party."[63] Cri-

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[53] *Id.*

[54] *Id.*

[55] 10 U.S.C. § 2306(f) (1982).

[56] FAR 15.802(a).

[57] CICA §§ 2712, 2724.

[58] *Id.*

[59] In Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), the Supreme Court held that disappointed bidders have no enforceable rights that would provide a United States district court with jurisdiction.

[60] 42 Stat. 23, 31 U.S.C. § 3702(1982).

[61] CICA § 2741.

[62] FAR 14.407-8(A) (proposed).

[63] General Accounting Office bid protest rules, 4 C.F.R. § 21.1 (1984).

teria for determining an interested party were developed in GAO decisions.[64] These criteria are reflected in the Act which defines an "interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or failure to award the contract."[65]

The Act does not provide specific limits for filing a protest with GAO but does require that the GAO publish regulatory procedures by 15 January 1985.[66] These new "proposed" procedures do not change the existing time limits for filing a protest and remain as follows:

> Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. In cases other than those covered above, protests shall be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier.[67]

While the time limits have not changed, some of the procedural requirements have. For a protest to be "filed," it must be received by the Procurement Law Control Group of the GAO and the protester must show evidence of service upon the contracting agency and contracting activity.[68] Service may be made by personal delivery, by commercial mail carrier, or by mailing "in the United States mail (certified, first class, or overnight mail only)" to both locations.[69]

After receiving a protest, the GAO must notify the agency involved within one working day.[70] Unless otherwise notified by the GAO,[71] the agency is required to file a complete report with the GAO within twenty-five working days after receiving this notice.[72] At the same time, the agency must also serve the report upon the protester.[73] The agency may submit a written request seeking an extension of the twenty-five day time period, but the GAO will grant extensions on exceptional bases only and will grant them sparingly.[74] The agency may be required to submit the report within ten working days when the Comptroller General elects to use the express option (discussed in detail later).[75] Once the agency report has been filed, the contractor has seven working days to file comments on the agency's report. If the protester fails to file comments within the seven day period, the protest will be dismissed by the GAO.[76] The GAO may grant an extension to the protester, but only in exceptional circumstances.[77]

Several of the major procurement agencies have expressed concern over their ability to meet the time limits established in the Act.[78] The GAO rules do provide some flexibility, albeit only in exceptional circumstances. Mr. Seymour Efros, GAO Associate General Counsel for Procurement Law, has advised agencies that if a "full blown" report cannot be provided within the twenty-five day period, the agency should furnish whatever information is available.[79] With such stringent time contraints it is imperative that agency officials act without delay.

If an agency receives notice of a protest from the GAO prior to contract award, the agency may not award a contract while the protest is

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[64]Comp. Gen. B-192668 (Nov. 29, 1978), 78-2 CPD ¶ 374.

[65]CICA § 2741.

[66]CICA § 2741.

[67]General Accounting Office proposed bid protest rules to be printed at 4 C.F.R. § 21.2(a) [Hereinafter all C.F.R. citations are to the proposed bid protest rules and are to be printed at the sections cited].

[68]4 C.F.R. § 21.1(b)(1).

[69]4 C.F.R. § 21.1(b)(2).

[70]CICA § 2741; 4 C.F.R. § 21.3(a).

[71]CICA § 2714.

[72]CICA § 2741; 4 C.F.R. § 21.3(c).

[73]4 C.F.R. § 21.3(c).

[74]4 C.F.R. § 21.3(d).

[75]CICA § 2741.

[76]4 C.F.R. § 21.3(e).

[77]*Id.*

[78]42 Fed. Cont. Rep. (BNA) 657 (Oct. 15, 1984).

[79]CICA § 2741.

pending (the agency must stay award of the contract). Award can be made only if the head of the contracting activity (HCA) determines in writing that "urgent and compelling circumstances significantly affecting the interests of the United States will not permit waiting for the decision of the Comptroller General . . . and advises the Comptroller General of that finding."[80] This determination may be made only if the agency anticipates that award of the contract will occur within thirty calendar days.[81]

When the agency receives notice of a protest from the GAO within ten days after the date of a contract award, it must immediately order the contractor to stop work on the contract.[82] The Act also provides that while the protest is pending, performance of the contract may not be reinstated unless the HCA determines in writing "that performance is in the best interests of the United States; or urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General; and the Comptroller General has been so notified."[83] The FAR provides that the head of the agency will make the required written findings in both instances but also provides for delegation not below the HCA.[84] If the delegation of authority from the head of the agency is not made, we will have a situation where the regulations establish a higher approval authority than envisioned by the Act.

For the first time the GAO has statutory time limits with which it must comply. It is required to render a decision on a protest within ninety working days from the date the protest is filed.[85] The GAO may extend the ninety day period by providing written reasons and circumstances why a longer period is required, but these extensions are regarded as exceptional.[86] Because of these limits, the GAO will require the protester and agency to comply strictly with all time limits imposed on them.

The Act also requires that the GAO prescribe regulations establishing an express option for resolving protests within forty-five calendar days from the date the protest is submitted.[87] The proposed GAO procedures provide for using an express option (providing for an expeditious decision) "solely at the discretion of the Comptroller General only in those cases suitable for resolution within 45 calendar days."[88] Requests for the express option, either by the protester or the government, must be in writing and received by the GAO within three days after the protest is filed.[89] When the express option is used, the agency must file a complete report within ten working days after receiving notice that the express option will be used,[90] and the GAO must render its decision within forty-five calendar days.[91]

If the Comptroller General determines that the protested solicitation does not comply with a statute or regulation, the Comptroller General shall recommend to the agency any combination of the following remedies:

(1) Refrain from exercising options under the contract;

(2) Recompete the contract;

(3) Issue a new solicitation;

(4) Terminate the contract;

(5) Award a contract consistent with the statute or regulation; or

(6) Such other recommendations as the

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[80]CICA § 2741; 4 C.F.R. § 21.4(a); FAR 14.407-8(c)(6).

[81]CICA § 2741; 4 C.F.R. § 21.4(a).

[82]CICA § 2741; 4 C.F.R. § 21.4(b); FAR 14.407-8(c)(7).

[83]CICA § 2741; 4 C.F.R. § 21.4(b); FAR 14.407-8(c)(7).

[84]FAR 14.407-8(c)(6) & (7) (proposed). The present regulations provide that the Deputy Assistant Secretary of the Army (Acquisition) will approve contract award (Army FAR Supplement 14.407-8(b)(98) and 1.290 (b)(6)). The new regulations may retain the authority at that level.

[85]CICA § 2741; 4 C.F.R. § 21.8(a).

[86]CICA § 2741; 4 C.F.R. § 21.8(c).

[87]CICA § 2741.

[88]4 C.F.R. § 21.9(b).

[89]4 C.F.R. § 21.9(c).

[90]4 C.F.R. § 21.9(d).

[91]4 C.F.R. § 21.9(d)(4).

Comptroller General deems necessary to promote compliance with acquisition statutes and regulations.[92]

This list of recommendations is merely a codification of the existing remedies available from the GAO. In determining the appropriate recommendation, the GAO will continue to consider all the circumstances surrounding the acquisition in question.[93] If a protest is filed within ten days of contract award and the HCA finds that performance of the contract is in the government's best interest and orders continued performance, the Comptroller General must make its recommendation without taking into consideration any cost or disruption from terminating, recompeting, or reawarding the contract.[94] If the GAO finds a violation of statute or regulation and fails to recommend one of the remedies listed in the Act, the disappointed bidder arguably has a statutorily enforceable cause of action in Federal District Court because the Act appears to provide the GAO with no discretion in this area. However, if the HCA determines that contract performance should continue based upon a finding of urgent and compelling circumstances, then the GAO may consider cost or disruption in fashioning a remedy.

The Act gives the GAO authority to award the protester the cost of "filing and pursuing the protest, including reasonable attorney's fees; and bid preparation costs."[95] However, the proposed GAO procedures will allow recovery of these two costs only if it is not feasible to recommend any of the remedies listed in the Act.[96]

The Act has some additional noteworthy provisions concerning bid protests. First, if the agency fails to implement the GAO's recommendations within sixty days of receipt, the HCA must report this to the Comptroller General.[97] The Comptroller General will provide an annual report to Congress on any Executive branch failures to comply with recommendations. Second, within five days of receiving a request for documents, the agency must provide "any document relevant to the protested procurement action that would not give that party a competitive advantage and that the party is otherwise entitled to receive."[98] Third, the Act gives the Comptroller General authority to dismiss a protest that he "determines is frivolous or which, on its face does not state a valid basis for protest."[99] Fourth, GAO's proposed regulations list "grounds for protest which will be summarily dismissed without requiring the agency to submit a report."[100] Fifth, the Act does not give the Comptroller General exclusive jurisdiction over protests; it does not "affect the right of any interested party to file a protest with the contracting agency or to file an action in a district court of the United States or the United States Claims Court."[101]

When President Reagan signed the bill, he objected to the GAO bid protest provisions. He believes these "provisions would violate the separation of powers doctrine by delegating to GAO—an arm of Congress—duties and responsibilities that are the function of the Executive Branch."[102] As a result of President Reagan's position on the GAO protest procedures, it may be safe to assume that there will be some litigation pertaining to the constitutionality of these provisions. Late in October 1984, the Department of Justice advised executive agencies that two of the bid protest provisions of the Act are unconstitutional and should not be implemented.[103] The two provisions are: a procur-

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[92]CICA § 2741; 4 C.F.R. § 21.7(a).

[93]4 C.F.R. § 21.7(b).

[94]CICA § 2741; 4 C.F.R. § 21.7(c).

[95]CICA § 2741.

[96]4 C.F.R. § 21.7(e).

[97]CICA § 2741.

[98]CICA § 2741; 4 C.F.R. § 21.5.

[99]CICA § 2741.

[100]4 C.F.R. § 21.3(f) (1)-(11).

[101]CICA § 2741.

[102]84-17 Communique 1 (Federal Publications Inc.), Aug. 13, 1984.

[103]Department of Justice Memorandum on the Constitutionality of the Bid Protest Provisions in CICA, 42 Fed. Cont. Rep. (BNA) 755 (Oct. 29, 1984).

ing activity must stay a procurement pending resolution of a bid protest by the Comptroller General; and the authority is given to the Comptroller General to require a procuring agency to pay attorney's fees and bid preparation costs.[104]

[104]*Id.* The Department of Justice position is that these two provisions violate the separation of powers doctrine established by the Constitution because GAO, a legislative agent, has been given powers constitutionally committed to the executive and judicial branches of the government. The Department finds nothing improper concerning the requirement for a stay, in and of itself, and argues that the problem arises from the power to lift the stay, giving the Comptroller General the power to dictate when a procurement may proceed. The Department relies on the cases of INS v. Chadha, 103 S.Ct. 2764 (1983), and American Federation of Government Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982). In *Pierce* the court considered a statute requiring the Department of Housing and Urban Development to suspend any reorganization until it obtained approval from certain congressional committees. The court held this provision could be interpreted as a form of legislative veto, but it also stated:

> The provision can also be taken as granting the Appropriations Committees the power to lift a congressionally-imposed restriction on the use of appropriated funds. In this light, the directive is nothing more or less than a grant of legislative power to two congressional committees. It is plainly violative of article I, section 7, which prescribes the only method through which legislation may be enacted and which "restrict[s] the operation of the legislative power to those policies which meet the approval of three constituencies, or a super-majority of two."

697 F.2d at 306.

Therefore, under *Pierce* the Department argues that granting the power to lift a stay is an unconstitutional grant of power to an arm of Congress. If this is the case, once a stay takes effect it would remain in effect indefinitely since there is no statutory basis for terminating the stay. The Department, therefore, argues that the entire stay provision must be stricken because the entire provision is not severable. The requirement to stay a procurement will not operate properly if there is no authority to lift the stay. Therefore, the Department argues that the entire provision must be stricken.

As to the provisions dealing with damages, the Department of Justice again argues that Congress is purporting to vest authority in the nature of a judicial power in the Comptroller General. The Department argues that vesting such judicial power in one of its own agents is impermissible under *Chadha.*

The Department of Justice has recommended to the executive agencies that the stay provisions of CICA should be ignored and the agencies should proceed with the procurement process, except for those provisions of FAR 14.407-8(b)(4) where the agencies have voluntarily agreed to stay proceedings pending the resolution of bid protests. With regards to the damages provision, executive agencies should not comply, under any circumstances, with awards of attorney fees or bid preparation costs made by the Comptroller General.

GSBCA Protest Procedures for ADPE

The Brooks Act[105] gave the GSA sole authority to purchase Automatic Data Processing Equipment (ADPE) and services for other government agencies. The Brooks Act did not establish a forum for resolving ADPE acquisition protests. The CICA provides for a three-year test program giving the General Services Administration Board of Contract Appeals (GSBCA) authority to resolve protests arising from ADPE acquisitions.[106]

Any interested party may file a protest with the GSBCA in connection with an ADPE acquisition under the Brooks Act, unless he or she has previously filed with the GAO.[107] The board is required to hold an initial hearing within ten days from the time the protest is filed to determine whether to suspend the procurement authority of the GSA Administrator or the Administrator's delegation of procurement authority on an interim basis.[108] The board may suspend procurement authority unless the agency involved establishes that: "(1) contract award wil be made in the next 30 days; and (2) urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting for the decision of the board."[109]

If the board receives a protest within ten days after the contract award, it must hold a hearing within ten days after the protest has been filed, if requested. The purpose of the hearing is to determine whether the GSBCA should suspend the procurement authority of the Administrator

[105]Automatic Data Processing Equipment, Pub. L. No. 89-306, 79 Stat. 1127 (1965).

[106]CICA § 2713.

[107]*Id.*

[108]*Id.*

[109]*Id.*

or his or her delegation of procurement authority for the challenged acquisition.[110] The board is required to suspend such authority to acquire any goods or services under the contract that have not previously been delivered and accepted unless the contracting agency involved establishes that "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board."[111]

Final decisions must be rendered by the GSBCA within forty-five working days after the date of filing unless the board's chairperson finds that the unique circumstances of a particular protest require a longer period of time.[112] If the board sustains the protest, it may suspend, revoke, or revise GSA's ADPE procurement authority with respect to the disputed acquisition.[113] The GSBCA may also award the costs of: "(1) filing and pursuing the protest, including reasonable attorney's fees; and (2) bid and proposal preparation."[114] The board's decision may be appealed by either party to the United States Court of Appeals for the Federal Circuit.[115] If the GSBCA revokes, suspends, or revises the GSA's ADPE procurement authority after contract award, the affected contract is "presumed valid as to all goods or services delivered and accepted under the contract before the suspension."[116]

The Act requires the GSBCA to promulgate rules and procedures for handling ADPE bid protests filed with it.[117] The board, in drafting its proposed rules for bid protests, has basically amended its present rules used in appeals under the contract disputes procedure.

A protest is brought by filing a complaint with the GSBCA. A copy of the complaint must also be sent to the contracting officer.[118] The board will consider a protest that is timely filed. When alleged improprieties in the solicitation which are apparent before bid opening are the basis of a protest, the protest must be filed prior to bid opening or in negotiated procurements before the date set for receipt of proposals.[119] All other protests must be filed no later than ten days after the basis for protest is known or should have been known and generally not later than ten days after award of the contract.[120] The government is required to file an answer no later than ten days after the filing of the protest. The government is not permitted to file a dispositive motion or a motion for more definite statement in lieu of an answer.[121] Within the ten day period, the government must also submit a protest file/administrative record to the board and the protester. The protester has five days after this submission to file additional documents.[122]

The proposed rules provide for intervention by motion in a protest by an interested party, an intervening agency or permissive intervenors who establish a vital stake in the outcome.[123] This means the GSA would be permitted to intervene when it has delegated procurement authority to another agency, or the agency would be permitted to intervene when the GSA is acquiring the ADPE for the agency. Conferences, which would be authorized and ordinarily held within five days after the filing of the protest, would be used to clarify issues, stipulate to matters not in dispute, and otherwise aid in the disposition of the protest.[124] Discovery

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[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] Rule 7(b)(2), General Services Board of Contract Appeals (GSBCA) proposed procedures for considering ADP protests.

[119] To be printed at Rule 5(b)(3)(A), GSBCA.

[120] To be printed at Rule 5(b)(3)(B), GSBCA.

[121] To be printed at Rule 7(c)(2), GSBCA.

[122] To be printed at Rule 4, GSBCA.

[123] To be printed at Rule 5(a)(3), GSBCA.

[124] To be printed at Rule 10(a), GSBCA.

would be available to the parties, to intervenors of right (interested party or intervening agency), and to intervening agencies. Permissive intervenors would be permitted discovery only to the extent necessary to support their vital stake in the outcome.[125] Discovery would be permitted only in accordance with a GSBCA order that establishes a discovery schedule acceptable to the board.[126] Even though each party would be expected to cooperate in the discovery process, the board is extending its subpoena power to protests.[127]

Conclusion

The CICA provides the most extensive revision to statutes pertaining to the government contracting process in over thirty-five years. Equally extensive revisions are being written for the FAR. But will the Act achieve its goal of increasing competition.?

Competition is mandatory under current procurement regulations. Changing "formal advertising" to "sealed bids" is in large measure cosmetic. Changing "negotiation" to "competitive proposals" is similarly less than dramatic.

The approval requirements for noncompetitive acquisition justifications arguably injects another dose of micro-management into the procurement system. The staffing delays entailed with these approval requirements will extend procurement lead times. Thus another hurdle is added to the race to meet mission requirements before the budget expires.

The codification of bid protest procedures also seems unnecessary. There is no apparent benefit to this action and the detriment of added inflexibility is obvious. It has also stirred up a minor constitutional crisis.

In summary, the CICA and consequent FAR, Department of Defense FAR Supplement, and Army FAR Supplement revisions have entailed and will entail a major effort by attorneys, contracting officers, and requiring activities striving to work with new terminology, new actors, and new procedures. It can only be hoped that this major effort will not prove disproportionate to the number of real and measurable differences in the status quo.

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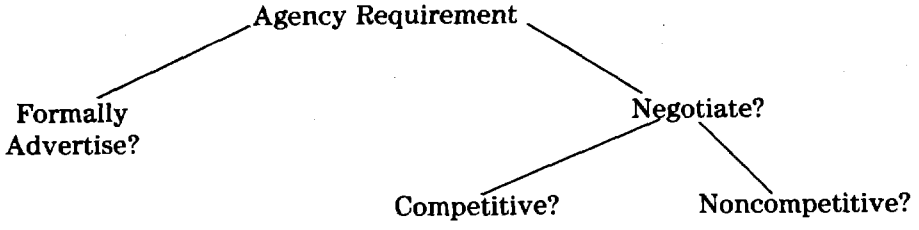
[125]To be printed at Rule 15(b), GSBCA.

[126]To be printed at Rule 15(c), GSBCA.

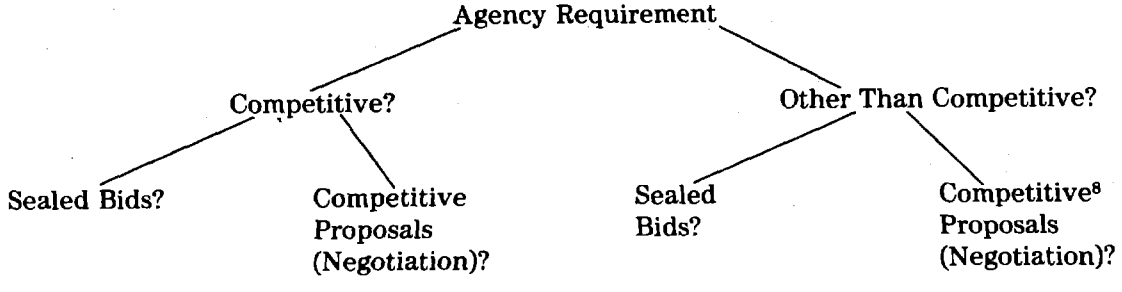
[127]To be printed at Rule 20(b), GSBCA.

Appendix

Pre CICA Analysis



Post CICA Analysis



CAS³: More Than Just Another Acronym

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Since 1981 many JAGC officers have had the opportunity for advanced military schooling besides the courses offered by The Judge Advocate General's School. Before the advent of the Combined Arms and Services Staff School (CAS³), only the relatively few Army lawyers selected for Command and General Staff College (CGSC), the Armed Forces Staff College (AFSC), or the senior service colleges such as the Army War College (AWC), have had the opportunity to receive branch-immaterial training with officers from all branches of the Army.

JAGC officers currently attend CAS³ between their third and sixth year of commissioned service. Unlike senior and intermediate service schools like the AWC and CGSC, military attorneys are not selected for attendance by a selection board, but rather are chosen by the Personnel, Plans, and Training Office (PP&TO), Office of The Judge Advocate General, based on an equitable distribution of available slots. Currently, forty Army lawyers are projected to attend in fiscal year 1985, with the number increasing to eighty beginning in fiscal year 1986. PP&TO attempts to avoid sending officers to CAS³ immediately before or after other schooling, such as the Judge Advocate Officer Graduate Course. With the limited number that may attend, the constraints of avoiding repetitive schooling and sending more than one attorney from any one office, and the informal selection process, nonselection for CAS³ should not be viewed as a negative indicator of one's status in the Corps. Furthermore, successful completion of CAS³ is not a prerequisite for selection to attend CGSC or AFSC.[1] When the available slots increase to eighty, PPT&O expects that it will be able to implement the Army's policy of sending all officers to CAS³ between the third and sixth year of service.

The mission of CAS³ is to provide active duty and Reserve Component officers the instruction necessary to serve as staff officers with Army field units. This instruction has three objectives:

1. Teach what staffs are by defining and tracing the development of staff roles;

2. Teach what staffs do by presenting instruction on staff procedures and skills; and

3. Teach how staffs operate.[2]

These objectives resulted in the formulation of the CAS³ instructional goals:

1. Improve the ability to analyze and solve military problems;

2. Improve the ability to interact and coordinate as a member of a staff;

3. Improve communicative skills; and

4. Improve one's understanding of Army organization, operations, and procedures.[3]

The course has nonresident and resident phases. Phase I, the nonresident phase, is designed to develop a common base among students. It primarily covers instructional goal number 4, above.[4] The Phase I materials consist of fifteen self-paced modules and are sent to JAGC officers after notification of selection to

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[1]U.S. Army Judge Advocate General's Corps Pamphlet, JAGC Personnel Policies, October 1984, at 12.

[2]Farris, *CAS³: The Army's New Staff Officer Course*, Military Review, April 1984, at 39, 40.

[3]*Id.*

[4]Anderson, *Evaluating CAS³ Instruction*, Military Review, July 1984, at 27, 28.

attend CAS³. Communicative Arts, Historical Development of Staffs, Staff Skills-Roles-Relationships, The Decisionmaking Process, Quantitative Skills, Personnel and Administration Operations, Basic Logistic Principles, Training Management, Staff Leadership, Budget, Reserve Components and Mobilization, Tactics, Threat Forces, Organization of Army Divisions, and a Comprehensive Examination comprise the modules.[5] Completion of the examination is a prerequisite for attendance at the resident Phase II.

Phase II is conducted at the Command and General Staff College, Fort Leavenworth, Kansas. The post also houses the Combined Arms Center and the U.S. Disciplinary Barracks and is adjacent to Leavenworth, Kansas, about thirty miles from Kansas City, Missouri. Although Leavenworth is a small town, many sporting, shopping, and cultural opportunities exists with the Leavenworth—greater Kansas City area. Kansas weather is often extreme, and a car is an asset while TDY to the course because not all CAS³ students are billeted on post.

Some CAS³ students have facetiously opined that the course is only slightly better than a sentence to the Disciplinary Barracks. While the two are hardly comparable, the resident phase of CAS³ is certainly intense. All of the instruction is conducted during the six problem-solving exercises:

1. Staff techniques. This exercise entails the preparation of staff products such as decision papers, fact sheets, decision briefings, and the like.

2. Training management. CAS³ students prepare training plans to include resourcing, using Training Management Computer Systems minicomputers.

3. Budget exercise. Students formulate an annual budget.

4. Mobilization exercise. This exercise includes formation of a mobilization plan, an operational readiness assessment, and development of a training program for readiness improvement.

5. Preparation for combat operations. This exercise involves planning for moving a division overseas and engaging in combat operations in a NATO senario.

6. Command post exercises. This final exercise involves division tactical operations in a near-real-time combat simulation.[6]

These exercises are conducted in twelve-officer staff groups. Each staff group has a "staff leader," an experienced lieutenant colonel who probably has commanded a battalion. They provide daily feedback on each student's performance.

And perform they must! During the nine-week course each student will complete at least sixty-seven different requirements. Homework averages between three to five hours each weekday and about eight hours over weekends. CAS³ has been called "an intellectual ranger course." However, the course director and many instructors have noted that JAGC students do quite well. A lawyer's ability to reason analytically and to write and speak well are among the skills necessary to successful completion of the course.

Formal evaluation consists of an academic evaluation report (AER). In addition, each student receives three counselling reports during the course. There are no letter grades or class standings in the course. Thus, the AER consists of a standard narrative and a notation that the student met course requirements, the weight standards, and passed the Army Physical Readiness Test (APRT).[7]

Students are weighed during inprocessing and those who do not meet Army standards are immediately disenrolled. There is a diagnostic physical readiness test in the first week, and a "for record" one at the end of the course. The APRT must be passed to graduate. Each staff group has a physical training program and intramural sports are played.

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[5]Farris, *supra* note 2, at 41.

[6]*Id.*

[7]*Id.*

Attendance at CAS³ is beneficial for Army lawyers for a number of reasons. Obviously, the more one knows about one's client, the better the legal advice one can provide. Not only does CAS³ teach a great deal about how the Army and Army staffs operate, the interaction with the combat arms, combat support, and combat service support officers in a staff group insures that JAGC attendees also learn about the leaders of the organization they serve. Perhaps more importantly, it exposes those officers to the highly competent and professional officers that make up the Corps. Many of those leaders have never had the opportunity to work with or socialize with a JAGC officer other than as related to legal matters. It is eye-opening for them to meet Army lawyers who are physically fit and able to function well in non-legal areas such as the six problem-solving exercises. The confidence this develops in our clients will pay dividends for years. Although there are no legal problems or requirements in the course, many JAGC students manage to educate their section mates by pointing out legal considerations involved in the various requirements. Finally, all military attorneys can improve their briefing and writing skills. Competency in courtroom arguments and legal briefs does not insure an acceptable briefing to the commanding general or a concise, well-written fact sheet.

Although the nine-week resident portion will not be a vacation, CAS³ should not be feared by officers who have finished law school and passed a bar exam. Rather, attendance at this course should be viewed as a challenging opportunity to grow professionally and to aid the Corps by representing it to other highly professional officers.

The Advocacy Section

The Army Lawyer *has long been a timely source of information and research on current legal problems. This month we add a new section, The Advocacy Section, devoted to articles addressing current legal problems from a prosecution or a defense perspective, or furnishing helpful trial practice suggestions to those actively engaged in trial practice.*

The Advocacy Section contains two parts: The Trial Counsel Forum and The Advocate. Both were previously published as separate periodicals. They are now included in The Army Lawyer *to make the valuable material they contain available to every active duty and Reserve Component judge advocate.*

Readers will note that there are two articles on uncharged misconduct in this issue. Colonel Gilligan's lead article discusses uncharged misconduct in general while Major Thwing's article in this section focuses on how a trial counsel may effectively use uncharged misconduct evidence. While The Army Lawyer *ordinarily will not publish more than one article on the same topic in an issue, both articles were published in this issue to better serve the needs of all judge advocates.*

The Trial Counsel Forum and The Advocate are prepared for The Army Lawyer *by the Trial Counsel Assistance Program and the Defense Appellate Division, respectively. Individuals desiring to contribute to either should send their contributions directly to TCAP or DAD.*

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TRIAL COUNSEL FORUM

Trial Counsel Assistance Program (TCAP)
US Army Legal Services Agency

This is the first publication of the Trial Counsel Forum *as a part of* The Army Lawyer. *Previously, the* Forum *was a monthly newsletter provided primarily to Army trial counsel. It has been discontinued as a separate publication; however, TCAP has been directed by The Judge Advocate General to provide the same type and quality of information for publication in this new format.*

Topic selection, helpful hints on prosecutorial techniques, and advocacy issues will continue to be dictated by the needs of trial counsel. As its name implies, it is intended to be more than a vehicle for the one-way transmission of ideas. Trial counsel should call TCAP at AV 289-1804 about their problems and suggestions. In particular, if you have met and dealt with a unique or difficult problem, share your expertise with others by mailing a brief description of the problem and your solution to: Trial Counsel Forum, ATTN: JALS-TCA, United States Army Legal Services Agency, 5611 Columbia Pike, Falls Church, VA 22041-5013.

This segment of the Trial Counsel Forum *includes the first of a two-part article dealing with Military Rule of Evidence 404(b). There is probably no area of evidence potentially more valuable to trial counsel, and yet more misunderstood.*

Contents

Military Rule of Evidence 404(b): An Important Weapon in the Trial Counsel's Arsenal

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I. Introduction

When the Military Rules of Evidence were promulgated, they were greeted by many trial practitioners as so much extra cargo; another example of adding complexity to the already complex pursuit of trial work. However, the decisional law, both military and federal, demonstrates that the rules of evidence are not merely adjunct matters for consideration in trial planning. Instead, they are an effective arsenal for use by diligent trial counsel. One of the most important, but frequently misunderstood,

weapon in this arsenal is Military Rule of Evidence (Rule) 404(b).[1] This rule is not entirely new. In general, it is similar to the provision concerning the admissibility of "uncharged misconduct" which was contained in the 1969 Manual for Courts-Martial.[2] On its face, Rule 404(b) is plain and simple:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The problem which has vexed trial counsel has not been the language of the Rule nor its history. Instead, the problem has been the method of applying the Rule with the kind of precision which would insure admissibility of uncharged misconduct at trial and also prevent reversal on appeal. Armed just with the language of the Rule, a trial counsel would obtain evidence of a prior act by an accused similar to the charged offense and marvel about how much stronger the case against Private Doe had become. If Private Doe committed a similar act, surely he committed the charged one. Yet, on the eve of trial, trial counsel would confront a host of unanswered questions: How do I introduce this evidence? What do I have to prove? When do I introduce it? What do I argue if the defense objects? These are the kind of questions this article will address.

II. Threshold Considerations

In analyzing Rule 404(b), there are at least two threshold considerations. First, trial counsel must understand the Rule's expansive scope. The Rule provides that in addition to "other crimes," a prosecutor may introduce evidence of "other wrongs" and "other acts." Consequently, trial counsel are not limited to proof of conduct resulting in criminal conviction or even to acts which are obviously criminal. Instead, the Rule opens the entire background of the accused to scrutiny, regardless of criminal implications, if it may have a fruitful bearing on the case.[3] Second, while it lists a number of factors for which other crimes, wrongs, or acts may be admitted, the Rule does not purport to be an exhaustive list.[4] Military and civilian case law clearly suggests that the factors are limited only by a prosecutor's ingenuity. For example, courts have recognized that other crimes evidence may be also admissible to prove, *inter alia*, "state of mind,"[5] "*modus operandi*,"[6] "lack of consent,"[7] "presence of mental responsibility,"[8] and "consciousness of guilt."[9]

III. Relevancy/Probity

Rule 404(b) must be considered in conjunction with the other rules of evidence. When viewed from this perspective, a framework for applying Rule 404(b) emerges. The case of *United States v. Beechum*,[10] perfectly illustrates this perspective and sets forth a framework for applying Rule 404(b):

> What the rule calls for is essentially a *two-step test. First*, it must be determined that the extrinsic evidence is relevant to an issue other than the defendant's character. *Second*, the evidence must

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[1]Manual for Courts-Martial, United States, 1984, Military Rule of Evidence 404(b) [hereinafter cited in text as Rule and in footnotes as Mil. R. Evid.].

[2]Manual for Courts-Martial, United States, 1969 (Rev. ed.) para. 138*g*, should be referred to when researching military cases decided before 1980 regarding the issues of "uncharged misconduct."

[3]S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 183 (1981) [hereinafter cited as Saltzburg].

[4]*See, e.g.*, Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 Pepperdine L. Rev 197 (1982).

[5]United States v. Teeter, 16 M.J. 68 (C.M.A. 1983).

[6]United States v. Ali, 12 M.J. 1018 (A.C.M.R. 1982).

[7]E. Imwinkelried, Uncharged Misconduct Evidence § 6:03 (1984) [hereinafter cited as Imwinkelried].

[8]United States v. Emery, 682 F.2d 493 (5th Cir. 1982).

[9]Imwinkelried, *supra* note 7, at §5:14.

[10]582 F.2d 898 (5th Cir.), *cert. denied*, 440 U.S. 990 (1978).

possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of *rule 403.*[11]

Because this two-step test has been employed by the military courts as well, it is important that trial counsel understand its application.

A. Does Not a Plea of Not Guilty Always Make 404(b) Evidence Relevant?

The plain answer to this question is no. A not guilty plea does not automatically create issues such as intent, knowledge, motive, or identity; nor does it raise affirmative defenses such as mistake or accident.[12]

The relevance of the evidence will flow from the nuances of the pleading. The trial counsel should attach great weight to the Rule 404(b) evidence and make tentative plans for how the case will be tried at the time the specific charge is selected. Identical facts can create pleading options which need to be addressed before charges are preferred because the option selected may determine whether the 404(b) evidence will be admissible.

A child abuse case is an excellent example of the need for planning at this early stage. Consider the case of a child admitted to a hospital with a serious physical injury. The child has been under the care of a sole parent and has a history of prior, unexplained injuries. Trial counsel might, at first glance, consider it prudent to charge the parent with assault with a means likely to cause serious bodily harm. That would leave the proof of the means used to the testimony of an expert witness. Such charging would obviate the need to prove intentional infliction of harm because the element of intent is a matter to be inferred simply by the doing of the act of violence; it is not an issue unless the accused specifically asserts an affirmative defense, such as accident. Moreover, identity does not become an issue unless the accused raises it by denying that he was present with the child at the time of injury. A plea of not guilty, therefore, would not bring these factors into issue. Further, given these facts, it is unlikely that motive, plan, knowledge, preparation, or opportunity would be issues. In this scenario, it is apparent that the defense would control whether and when the evidence of prior injuries would be admissible. As drafted, the charge would provide the defense counsel with a strong tactical basis for choosing not to raise an affirmative defense in order to prevent the admission of the prior injuries. This would leave the government in a weaker posture with its case supported only by circumstantial evidence. Trial counsel could avoid this result by charging the accused with intentional infliction of grievous bodily harm. That charge would clearly place the specific intent of the accused in issue regardless of the posture of the defense. The prior injuries of the child would be particularly relevant to specific intent.[13]

The contrast in results from this example highlights two general principles. First, even if 404(b) evidence is relevant to a specific issue in a case, a not guilty plea by itself will not insure its admissibility. Second, the pleading of *certain* criminal offenses can insure admissibility simply by the entry of a not guilty plea, *e.g.*, specific intent offenses, and, therefore, careful consideration is vital at the charging stage.

B. What Kind of Relationship Must Trial Counsel Demonstrate Between the Rule 404(b) Evidence and the Offense Charged?

There is no comprehensive answer to this question because the facts of each case will produce differing requirements. However, *United States v. Janis*[14] provides an excellent starting

[11] *Id.* at 911 (emphasis added).

[12] In United States v. Shackelford, 738 F.2d 776 (7th Cir. 1984), the accused was charged with attempting to collect a debt by the use of extortionate means (threatening to blow up the victim's store with a pipe bomb). The trial court allowed the government to present evidence of a similar incident during its case-in-chief, but the court of appeals reversed because the prior incident was not shown to be relevant to any specific issue (it was not relevant to intent because specific intent was not an element of the offense; and it was not relevant to identity because the issue of misidentification was never raised).

[13] United States v. Janis, 1 M.J. 395, 397 (C.M.A. 1976).

[14] 1 M.J. 395 (C.M.A. 1976).

point. In *Janis*, the Court of Military Appeals held that the prosecution could introduce evidence of appellant's admission of involvement in the death of his first child because it was relevant to the accused's intent in a charge of the unpremeditated murder of his second child. However, the court also held that even if evidence of other crimes is relevant to a case, the government must still demonstrate nexus in time, place, and circumstance between the offense charged and the uncharged misconduct.[15] While there are no precise rules regarding these nexus requirements, trial counsel must consider these specific factors as they bear on the general issue of relevancy. Case law suggests that lack of one or all of these nexus requirements lessens the relevancy and the probity of the evidence, thereby militating against admissibility.[16] These cases suggest that the more remote in time, place, and circumstance the 404(b) evidence, the greater the degree of similarity it must bear to the charged criminal act.[17] Thus, while the uncharged misconduct introduced in *Janis* occurred three years before the charged offense, it was admissible because there was a near identical factual relationship between the prior acts and the charged conduct.

C. Must Trial Counsel Prove That the Accused Committed the Other Crime, Wrong, or Act Beyond a Reasonable Doubt?

Both federal and military case law are clear that the prosecution is not required to prove beyond a reasonable doubt[18] that the accused committed the other crime, wrong or act. While there is a split of authority in the federal courts about the degree of proof required, the Court of Military Appeals in *Janis* established that trial counsel must demonstrate by plain, clear, and conclusive evidence that the accused committed the other crime, wrong, or act.[19] As a result, trial counsel must be familiar with and be able to respond to the requirements of *Janis* even though Rule 404(b) does not explicitly incorporate them.

D. Can Trial Counsel Introduce Evidence of Other Crimes, Wrongs, or Acts Which Have Occurred After the Charged Offense?

In *United States v. Hill*,[20] the U.S. Air Force Court of Military Review held that the trial judge did not err in admitting evidence of a check uttered thirty-one days *after* the last check charged in a prosecution for making and uttering worthless checks. Additionally, there is uniform agreement among the federal circuits that evidence of subsequent crimes, wrongs, or acts are admissible under Rule 404(b).[21] Thus, it has been held that evidence of an act of delivering cocaine to the accused several weeks after a charge of conspiracy to possess and distribute cocaine was admissible to prove intent.[22] Similarly, acts of receiving stolen goods eighteen months subsequent to a charge of aiding and abetting a theft of televisions from interstate shipment were ruled admissible on the issue of knowledge and intent.[23] Further, in several cases involving the failure to file income tax returns, evidence of the filing of income tax returns several years subsequent to the charge have been ruled admissible on the issue of intent.[24] Additionally, in several cases concerning charges of conspiracy to distribute illicit drugs where the defense of entrapment was raised, various federal circuit courts of appeal have admitted evidence of subsequent illicit drug trans-

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[15] *Id.* at 397.

[16] *See* United States v. Beechum, 582 F.2d 898 (5th Cir.), *cert. denied*, 440 U.S. 990 (1978).

[17] An extensive discussion of this proposition and case citations may be found in Imwinkelreid, *supra* note 7, at §8:08.

[18] *See* Saltzburg, *supra* note 3, at 184.

[19] 1 M.J. at 397.

[20] 13 M.J. 948 (A.F.C.M.R. 1982).

[21] DePue, *Introducing Evidence of Other Crimes, Wrongs, or Acts Under Rule 404(b), M.R.E.*, Trial Counsel Forum, Feb. 1983, at 3.

[22] United States v. Hines, 717 F.2d 1481, 1489 (4th Cir. 1983).

[23] United States v. Hadaway, 681 F.2d 214, 217 (4th Cir. 1982).

[24] United States v. Thiel, 619 F.2d 778, 781 (8th Cir. 1980).

actions occurring several months after the charged offense to prove predisposition.[25]

E. At What Point in the Trial Should Trial Counsel Use 404(b) Evidence?

As discussed earlier, the manner in which an offense is charged can be of paramount importance to the trial counsel, especially when 404(b) evidence is crucial to the case. Examples of offenses in which the factors outlined in Rule 404(b) are clearly relevant are specific intent cases (intent) and conspiracy cases (plan, opportunity, knowledge). In most cases, however, because admissibility of 404(b) evidence depends upon the defense presentation of affirmative defenses, such as lack of mental responsibility, entrapment, alibi, mistake, or accident, and because case law precludes the admission of 404(b) evidence in anticipation of a defense, a real dilemma is presented to the trial counsel. Despite the fact that the new Rules for Courts-Martial require defense counsel to provide notice prior to trial of alibi and lack of mental responsibility defense,[26] trial counsel is still never assured the defense will actually produce evidence of the noticed theory and thereby make the 404(b) evidence admissible. As a consequence, trial counsel must decide whether to offer the evidence during the government case-in-chief using the argument advanced above, or to wait and offer the evidence in rebuttal. If offered in rebuttal, the trial counsel will have two arguments to advance for admissibility. First, the evidence is relevant to an element of the charged offense, *e.g.*, intent. Second, it is also relevant to rebut an affirmative defense, *e.g.*, introducing knowledge where a mistake of fact defense is raised. In his definitive work on uncharged misconduct, Professor Imwinkelried observes, "[A]fter. . . analyzing the facts of the case, it may become apparent that a single act of uncharged misconduct is admissible on several theories of independent logical relevance."[27]

In deciding whether to offer the evidence initially or to wait, trial counsel also must be acutely aware of the stages during trial which signal the direction the defense is taking. For example, trial counsel must analyze any opening statement made because it frequently reveals the real posture of the defense. Similarly, trial counsel must closely monitor the defense theory as revealed in the cross-examination of prosecution witnesses. The defense will often surface those issues in the case upon which the posture of the defense is linked. Given these indicators, a well-prepared trial counsel will have the advantage of determining the point in the trial where the 404(b) evidence will achieve its greatest tactical advantage.

IV. Substantial Prejudice

Even after addressing the relevancy of 404(b) evidence, trial counsel must still address the second prong of the *Beechum* test: whether the evidence's relevance is outweighed by its prejudicial effect. Military Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

A. How Can Evidence Which Has Been Demonstrated To Be Relevant and Probative Be Outweighed by the Factors Outlined in Rule 403?

This issue surfaced in *United states v. Bailleaux*,[28] where the prosecution introduced evidence of a prior extortion conviction and the facts underlying the conviction to demonstrate the *modus operandi* of the accused to identify him as the perpetrator of the charged crime. The Ninth Circuit held that evidence of the prior conviction and its underlying circumstances was both highly probative and highly prejudicial. Nevertheless, the court reasoned that the issue was not whether the evidence

[25]United States v. Moschiano, 645 F.2d 314 (7th Cir. 1982); United States v. Mack, 643 F.2d 1119 (5th Cir. 1981).

[26]Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 701(b)(1), (2) [hereinafter cited as R.C.M.].

[27]Imwinkelried, *supra* note 7, at §3:01.

[28]685 F.2d 1105 (9th Cir. 1982). *See also* Sharpe, *Balancing in the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 59 Notre Dame L. Rev. 556 (1984).

was highly prejudicial, but rather whether it was unfairly prejudicial. Holding that the evidence was admissible, the court noted: "As used in Rule 403, "unfair prejudice" means that the evidence not only has significant impact on the defendant's case, (as opposed to evidence which is essentially harmless), but that its admission *results in some unfairness to the defendant because of its nonprobative aspect*".[29]

Applying a similar analysis, the Army Court of Military Review has reached the same conclusion. In *United States v. Clark*, the court stated:

> [Even after] conclud[ing] that the evidence was relevant, it remains to be determined whether the relevance of this evidence was substantially outweighed by the danger of unfair prejudice to the appellant. Military Rule of Evidence 403. Unfair prejudice as intended by the drafters of the rule does not mean evidence which is adverse to an opposing party for virtually all evidence is prejudicial or it isn't material. Rather, unfair prejudice means an undue tendency to decide an issue on an improper basis, commonly, though not necessarily, an emotional one.[30]

At least two guidelines are apparent from a comparison of the decisions in *Bailleaux* and *Clark*. First, 404(b) evidence will be excluded where trial counsel fails to demonstrate its relevance to a specific contested issue as opposed to its use as mere character evidence. Second, even when relevant to a specific issue, 404(b) evidence may still be excluded if the defense can demonstrate that its admission will result in undue consideration of extraneous or emotional matters far in excess of its relevancy.

B. In Approaching the Issues Raised by Rule 403, Is It Better To Use a "Shotgun" Approach and Argue That the Evidence of Other Crimes, Wrongs, or Acts Is Relevant to All the Factors Outlined in Rule 404(b), e.g., Intent, Motive, Opportunity, Knowledge?

United States v. Shackleford, discussed above, provides a clear answer to this question. The government was allowed to present evidence of prior acts of the accused as part of its proof of the charged crime of extortion. However, the government never provided a reasoned basis for the admissibility of these prior acts. The trial judge instructed the jury that it could consider the 404(b) evidence "only on the question of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[31] On appeal, the government agreed that due to the nature of the case, knowledge and absence of mistake of fact were not relevant matters for the jury to consider. Instead, the government argued that the jury properly could have considered the uncharged misconduct for purposes of motive, opportunity, intent, plan, or identity. The Seventh Circuit disagreed, finding that, if anything, the evidence tended to establish only the accused's propensity to commit such an offense, an obviously impermissible basis for the admission of the evidence. In reversing the trial court, the court opined that:

> The jury was left to decide what the terms "motive", "intent", "plan", etc. might mean in the context of this case and whether the evidence fit into any one of these categories. The jury would have had to study Weinstein's chapter on "Relevancy and Its Limits" in order to accomplish that assignment properly.[32]

Despite the existence of a strong similarity between the charged and the uncharged misconduct evidence, the court reversed because the trial judge's instruction allowed the jury to consider the evidence upon several improper bases.

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[29]United States v. Bailleaux, 685 F.2d at 1111 n.2 (emphasis added).

[30]15 M.J. 974, 977 (A.C.M.R. 1984).

[31]738 F.2d at 780.

[32]*Id.*

This error stemmed from the prosecutor's initial failure to articulate the proper basis for admission.

C.Does Rule 403 Require That 404(b) Evidence Always Be Similar to the Charged Misconduct Before It May Be Admitted?

The specific basis for the admission of the other crimes, wrongs, or acts evidence will determine the answer to this question. For example, in *United States v. Herrera-Medina*,[33] the court held that if the purpose of the proffered evidence was to show that the accused's prior conduct provided him with the opportunity, knowledge, preparation, or motive to commit the charged offense, uncharged misconduct need not be similar.[34] However, where evidence was offered to prove identity, *modus operandi*, or absence of mistake or accident, the prior conduct was relevant only if it was similar to the offense charged.[35]

A factual illustration of this holding is found in the case of *United States v. Myers*.[36] In *Myers*, the accused was charged with a Florida bank robbery. In an effort to establish the *identity* of the accused as the perpetrator of the robbery, the prosecution introduced evidence of a subsequent bank robbery by the accused in Pennsylvania. On appeal, the government argued that the evidence was properly admitted because of the following similarities between the charged and uncharged offense: (1) both crimes were bank robberies; (2) perpetrated by the same accused and co-accused; (3) they occurred at the same time; (4) at banks located on the outskirts of a town; (5) using a revolver; (6) and a bag to carry off the proceeds. Further, the perpetrators (7) wore gloves and (8) masks cruedly fashioned from nylon stockings. In rejecting this argument, the Fifth Circuit reasoned that these factors were general factors which could be found in most cases of robbery. The court held that rather than establishing the identity of the accused's propensity to commit the charged act. In rejecting the government's contention that the evidence was properly admitted, the court reasoned that

> [a] much greater degree of similarity between the charged crime and the uncharged crime is required when the evidence of the other crime is introduced to prove *identity* than when it is used to prove a *state of mind*. We have consistently held that for evidence of other crimes to be admissible the inference of identity flowing from it must be *extremely strong*.[37]

A similar conclusion was reached by the Court of Military Appeals in the recent case of *United States v. Brannan*.[38] In *Brannan*, the court found insufficient similarlity to allow uncharged misconduct to prove identity where the only basis of similarity was the distribution of marijuana from an automobile in a brown paper sack. The court questioned whether the method of distribution was "so unusual and distinctive" as to be "like a signature."[39]

D. Must Trial Counsel Prove That 404(b) Evidence Is Necessary to the Case Before It Is Admissible?

While there is no clear rule regarding this issue, a number of courts of appeal have held that the prosecution is not required to establish that the evidence is crucial to its case or that the case without the evidence is flimsy.[40] The real issue concerning necessity of the evidence is whether the evidence of uncharged misconduct represents a needless presentation of cumulative evidence.[41] The following two cases illustrate this point. In *United States v. Hans*,[42]

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[33]609 F.2d 376 (9th Cir. 1979).

[34]*Id.* at 380.

[35]*Id.*

[36]550 F.2d 1036 (5th Cir. 1977).

[37]*Id.* at 1045.

[38]18 M.J. 181 (C.M.A. 1984).

[39]*Id.* at 184.

[40]Imwinkelried, *supra* note 7, at §804 *et seq.*

[41]*Id.*

[42]738 F.2d 88 (3d Cir. 1984).

the accused was charged with robbing a Pennsylvania bank. The robbery took place during October 1980 and involved three armed individuals wearing Halloween masks. In November 1980, acting on an informant's tip, the FBI arrested "Norman Bauman." Although present at the time of this arrest, the accused was not arrested. The prosecution was allowed to introduce the testimony of an FBI agent to show a connection between the accused and Bauman and to explain why the accused had become a suspect. The agent was allowed to testify that because Bauman was from Detroit, he notified law enforcement agents in Detroit of the circumstances surrounding the Pennsylvania bank robbery. The agent testified that as he did so, the name of the accused immediately surfaced. No mention was made during the trial that the accused was involved in a bank robbery in Detroit. On appeal, the government argued that the admissibility of the FBI agent's testimony was relevant because it established a connection between Bauman and Hans. The Third Circuit ruled that the testimony of the agent was clearly inadmissible because "the only reasonable inference a reasonable juror could draw from the testimony was that Hans was well-known as a bank robber to the Detroit FBI.[43] Also, the testimony was cumulative because the prosecution had already established a connection between Bauman and the accused by virtue of the accused's presence with Bauman at the time of his arrest, and through testimony of another witness, and, therefore, the testimony created collateral issues which unfairly prejudiced the accused.

In contrast to *Hans* is *United States v. Emery*,[44] where the accused was also charged with bank robbery. At trial, the accused defended on the basis of lack of mental responsibility, alleging that he could not conform his behavior to the law because he was acting under a paranoid-delusion that a government agency was attempting to gain control over his mental powers. There was no issue at trial concerning the accused's intent or identity in the commission of the robbery. To rebut the accused's contention that he was legally insane at the time of the robbery, the prosecution introduced evidence of a prior robbery committed by the accused one month before the charged robbery which was nearly identical in execution. On appeal, the government argued that the evidence of the first robbery was necessary to demonstrate that the accused had indulged himself in the same state of mind in prepetrating both offenses. According to the government, this evidence showed a rational and calculated action. The accused argued that the extrinsic evidence was unnecessary because the government did not need to introduce the evidence to prove its case. The holding of the Fifth Circuit in *Emery* delineates how there was a difference between the 404(b) evidence offered here and that offered in *Hans*:

> In considering the government's need for the extrinsic offense evidence, we first acknowledge the heavy burden placed on the government once a defendant introduces slight evidence of lack of capacity: the government must prove beyond a reasonable doubt that the accused had the capacity to conform his conduct to the law. . . . This task is difficult not only because the government has a weighty burden of proof, but also because the object of proof—sanity—can never be established directly. . . . Insofar as evidence of the Atlanta robbery portrays appellant as a person who can conform his behavior to the law's requirements, it tends, however slightly, to help the trier of fact choose among expert explanations of appellant's conduct or reject expert opinion entirely.[45]

Judge Randall, dissenting, found this argument unpursuasive and the evidence to be of little productive value for the purpose offered. He also commented, "One thing is for sure, it *is* evidence that he is a bank robber."[46]

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[43] *Id.* at 95.

[44] 682 F.2d 493 (5th Cir. 1982).

[45] *Id.* at 499.

[46] *Id.* at 502 (Randall, J., dissenting).

E. Absent an Affirmative Request for Discovery, Is There a Requirement of Notice Before Introduction of 404(b) Evidence?

Professor Imwinkelried favors "[t]he imposition of a requirement for pretrial notice [as] both justifiable and salutory,"[47] but acknowledges that

> [t]he traditional and majority view is that the prosecution has no duty to give notice. The Michigan and Wisconsin courts have reaffirmed that view. Most federal courts are in accord. In so holding, the federal courts follow the lead of an old 1874 Indiana Supreme Court precedent and the language of Federal Rule of Evidence 404(b). When Congress wanted to incorporate a notice requirement into a Federal Rule of Evidence provision, Congress did so explicitly as in Rules 803(24) and 804(b)(5). During the Congressional consideration of the Federal Rules, Congress was urged to add a notice requirement to Rule 404(b), but Congress declined to do so.[48]

However, by failing to give notice, trial counsel can run afoul of other notice requirements found in the Manual.[49] Rule for Courts-Martial (R.C.M.) 701 (a)(3)(A) provides that before the beginning of trial the trial counsel must notify the defense of the names and addresses of all witnesses whom he or she intends to call in the case-in-chief. Additionally, upon defense request, any documents or tangible objects used to support the 404(b) evidence during the case-in-chief must be furnished for inspection pursuant to R.C.M. 701(a)(2)(A). Moreover, R.C.M. 701(a)(3)(B) provides a bright-line rule of notice in two areas where the prosecution may offer evidence in rebuttal: to rebut a defense of alibi, and to rebut a defense of lack of mental responsibility when the trial counsel has received timely notice under R.C.M. 701(b). Consequently, if the prosecution were to offer 404(b) evidence to show the *modus operandi* of an accused to establish identity and thereby rebut a defense of alibi, it is apparent that R.C.M. 701(a)(3)(B) would require the prosecution to provide the defense with the names and addresses of any witnesses he or she would call in this regard. As in *United States v. Emery*,[50] when 404(b) evidence is introduced to rebut the defense of lack of mental responsibility, notice of the names and addresses of witnesses must be furnished to the defense before trial. Moreover, while Rule 403 does not include a notice requirement, it does provide a concrete reason to supply notice in that the military judge can exclude surprise evidence because it may cause "undue delay" or a "waste of time."

Summary

Rule 404(b) provides a basis for introducing sensitive but relevant evidence. The analysis used to determine its admissibility can also help trial counsel prepare for the entire case. In understanding and applying Rule 404(b) for maximum government advantage, trial counsel must carefully consider when the evidence may be introduced and what arguments to make for the logical relevance of the evidence.

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[47]Imwinkelried, *supra* note 7, at § 909.

[48]*Id.*

[49]R.C.M. 701.

[50]682 F.2d 493 (5th Cir. 1982).

Government Briefs

1. Navy Court Examines Rule 804(b)(1)

In the August 1985 issue of the *Forum*, we highlighted the case of *United States v. Hubbard*[1] which held that Article 32 testimony, transcribed verbatim, was admissible under Military Rule of Evidence 804(b)(1) where the witness was not available. Rule 804(b)(1) requires that the motive of the defense counsel in questioning the witness at the earlier proceeding be the same as it would be at trial. *Hubbard* held that the determination of the similarity of motive must be on a case-by-case analysis.

Recently, in *United States v. Connor*,[2] the Navy-Marine Corps Court of Military Review reached the same conclusion. In fact, the Navy-Marine court may have gone even further in that the cross-examination in *Connor* was not nearly as effective or as complete as in *Hubbard*. Even though the cross-examination in *Connor* was not classic cross-examintion and few questions were asked, the Navy-Marine court concluded that because the opportunity for cross-examination was unlimited and the few questions asked demonstrated a similar motive, a sufficient foundation was laid. The fact that other questions could have been asked was not itself determinative.

The *Connor* case is instructive as a reminder of the scope of Rule 804(b)(1). While this provision requires that former testimony be verbatim, an earlier statement adopted by the witness at the Article 32 is admissible to the same extent as the actual testimony. In *Connor*, both an adopted sworn and unsworn statement were thus admissible.

The *Hubbard* and *Connor* opinions are also instructive reminders that later trial alternatives may hinge upon decisions made at the Article 32. For example, if the defense is willing to stipulate that a witness' earlier sworn statement may be considered by the investigating officer, do you nevertheless want to have the witness present in anticipation of future trial unavailability problems? If you stipulate, you will not be able to argue that the defense counsel had a similar motive and opportunity to question the witness as he or she would have had at trial.

2. "Receiving Stolen Property" Interpreted

The recent case of *United States v. Lowery*[3] demonstrates a peculiar charging dilemma where a trial counsel is apparently faced with a receipt of stolen property case. In *Lowery*, evidence suggested that appellant did not steal the subject property but willingly assisted another in attempting to sell the property. The government accepted a pretrial agreement to receipt of stolen property and agreed not to present evidence on charges of larceny and housebreaking. During the providency inquiry, appellant said that when he first agreed to assist his friend in selling the property, he did not know it was stolen. He explained that he took this property to another friend who kept it overnight before deciding that he did not want to purchase the property. This friend alerted appellant that the property was probably stolen. After obtaining this knowledge, appellant admitted that he nevertheless took back the property, put it in his car, and drove with the thief to another friend's house in a further attempt to dispose of the property.

Under these facts, Judge Naughton of the Army Court of Military Review concluded that appellant's plea of guilty could not be affirmed. To be convicted of receipt of stolen property, the accused must know that the property is stolen at the time he receives it. It does not matter that at some later point he obtains this knowledge because the UCMJ requires guilty knowledge contemporaneous with receipt.[4] This conclusion was not altered by the fact that

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[1]18 M.J. 678 (A.C.M.R. 1984).

[2]19 M.J. 631 (N.M.C.M.R. 1984).

[3]19 M.J. ___ (A.C.M.R., 9 Nov. 1984).

[4]United States v. Rokoski, 30 C.M.R. 433 (A.B.R. 1960).

appellant reacquired physical possession from his friend after obtaining the requisite knowledge. Judge Naughton concluded that "receipt" occurs through physical possession or through obtaining "apparent legal power to dispose of property."[5] In this case, appellant was given the power to dispose of the property at the outset, and he never relinquished this "apparent power" even though he allowed his friend to exercise physical possession overnight. The Army court, therefore, set aside the finding of guilty, and suggested alternative pleadings which would have covered this situation.

Judge Naughton said that the government could have charged appellant with wrongful disposition of stolen property, after obtaining knowledge that it was stolen, as service discrediting conduct in violation of Article 134. Alternatively, because the Kentucky receiving stolen property provision is much broader than the UCMJ (it includes disposition *after* obtaining knowledge), the government could have charged appellant under Article 134, pursuant to the Assimilative Crimes Act.

The lesson to be learned from *Lowery* is that in a receipt of stolen property case where the facts are not crystal clear, it is advisable to charge larceny under Article 121 (if appropriate) *and* the traditional receipt of stolen property, *as well as* a charge under Article 134 or the state statute that will cover cases where the accused did not have guilty knowledge at the time he first received stolen property.

[5]United States v. Walker, 384 F. Supp. 262, 263 (E.D. Tenn. 1973).

TC Field Notes

(TCAP Note: In July 1984, the body of an oriental woman was found in a county contiguous to Fort Carson. At the time of discovery, the victim had been dead for 18 to 20 hours. The cause of death was determined to be numerous blows to the head and body by a blunt object, knocking the victim's teeth out and bashing in her face. At this time, the accused reported to neighbors that his wife, a Korean national, was missing and that she had either gone to California or returned to Korea. Soon thereafter, the accused submitted his retirement papers and began the process of clearing his on-post quarters. A month after the victim's death, the CID became suspicious that the victim might be the accused's wife and, as a result, they conducted a search of his quarters. Numerous blood splatters were found throughout the quarters.

Through expert testimony at trial, the government proved that the blood spatters matched the victim's blood type and were caused by numerous intentional blows delivered at different locations in the quarters. Additionally, the experts were able to render an opinion as to the force and direction of the blows. Through circumstantial evidence, the government was able to establish that the blood splatters occurred at approximately the same time as the victim's death.

The admissibility of the blood splatter evidence was extensively litigated at trial. What follows is CPT Seth Mill's government reply brief to the defense motion to exclude this evidence. The government won the motion and the accused was convicted of murder and sentenced to confinement at hard labor for life.)

The government, by and through its undersigned counsel, hereby submits the following reply to the defense motion *in limine* to exclude certain blood grouping evidence:

1. The defense has correctly concluded that evidence is relevant which "has a 'tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence' Military Rule of Evidence (M.R.E.) 401." Thus, the issue becomes whether the questioned evidence is probative of some particular issue in the case. The vast majority of jurisdictions which have dealt with blood evidence in criminal cases have held such

evidence to be both relevant and admissible.[1] These include the following states and United States Circuit Courts of Appeals: Arizona, Colorado, Connecticut, Florida, Illinois, Maryland, Massachusetts, Missouri, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Washington, Alabama, Indiana, New Mexico, and Wisconsin; and the Fifth Circuit and the District of Columbia Circuit. The defense would appear to condition the admissibility of such evidence upon an artificial criterion that the blood must be typed and be the victim's blood type before it is admissible. It is important to note that the defense cites no case authority for this proposition.

2. In essence, the defense motion goes to the quality of evidence offered by the government, or in other words, the weight which should be afforded it. Many cases have held that untyped blood is both relevant and admissible at trial.[2] In *State v. Bauman*,[3] the Supreme Court of the State of Washington dealt with a murder prosecution wherein the government's expert witness testified that some itesms of evidence exhibited blood stains and strands of human hair. The expert, however, was unable to testify that the blood or the hair came from the body of the victim. For that reason, the defendant argued that the evidence was inadmissible. The court disagreed and held:

> The fact that a witness may not be able to positively identify a piece of evidence goes only to the weight of his testimony and not to its admissibility. *State v. Duree*, 324 P.2d 1074 (WA 1958). The expert's inability to say that the blood and hair came from the body of the victim was a matter to be argued to the jury and not a ground for excluding the evidence.[4]

It is significant to note that the court did not condition the admissibility of the evidence upon any test showing the blood grouping or even that it was human blood. Similarly, in *State v. Melson*,[5] the Tennessee Supreme Court confronted a murder prosecution wherein the evidence showed over 550 tiny spots of blood on the shirt and pants of the accused. None of the spots were large enough to test for blood type. Some of the evidence tested positive for human blood. The court held that the evidence was properly admitted and was "highly relevant."

3. The evidence should not be barred by M.R.E. 403:

a. The evidence is legally relevant because its probative value is not *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Blood stain and blood splatter evidence is highly probative in this case because it will enable various experts to determine the origin of the blood; as well as the number, the direction, and the velocity of the blows required to make such splatters. Additionally, it has been held that blood stain evidence is properly admissible to prove that an assault or beating occurred within a particular house.[6]

b. The use of the word "substantially" in Rule 403 suggests that, in close cases, the drafters intended that the evidence should be admitted rather than excluded.[7]

c. Although arguing that blood stain/splatter evidence is inflammatory, misleading, confusing, and unfairly prejudicial, the defense does not relate how these terms apply to the evidence. Indeed, the evidence is understandable and is not inflammatory because the splatters are extremely small. Consequently, there is lit-

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[1]Annot., 2 A.L.R. 4th 485, 498 (1980).

[2]Pedersen v. State, 420 P.2d 327 (Alaska 1966); People v. Carter, 312 P.2d 665 (Cal. 1957); State v. Hilton, 431 A.2d 1296 (Me. 1981); State v. Melson, 638 S.W.2d 342 (Tenn. 1982); State v. Bauman, 468 P.2d 684 (Wash. 1970); State v. Wheeler, 444 P.2d 687 (Wash. 1968).

[3]468 P.2d 684 (Wash. 1970).

[4]*Id.* at 686.

[5]638 S.W.2d 342 (Tenn. 1982).

[6]Commonwealth v. DiMarzo, 309 N.E.2d 538, 543 (Mass. 1974).

[7]*See* S. Saltzburg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual 176-80 (1981).

tle or no danger that the evidence would be used for something other than its logical, probative value. In *United States v. Tua*,[8] the Army Court of Military Review faced the issue of the admissibility of photographs and a movie film depicting a particularly savage beating. The court held the evidence was admissible for legitimate purposes and that its "shock value" was overriden by its probative value. In cases like *Tua*, it is recognized that the inflammatory nature of the evidence alone will not render it inadmissible.[9]

d. The Drafters' Analysis to Rule 403 indicates that the rule was designed to encourage stipulations when there is a Rule 403 problem. The defense has made no such offer to stipulate in this case.

4. The blood stain/splatter evidence is highly relevant to a number of issues which have been previously alluded to in this memorandum. By its very nature, blood grouping evidence does not identify a particular source, but only a particular group of people from which the blood may have come. As noted earlier, the vast majority of courts have held such blood stain/splatter evidence to be admissible and highly relevant in murder prosecutions. Many courts have recognized that the evidence, standing alone, may not be sufficient to obtain a conviction, but that it will provide an important link in the chain of proof which might lead fact finders to conclude that the accused committed the murder.[10] The mere fact that the evidence creates a possibility rather than a probability goes to weight, not admissibility.[11]

5. The tested evidence presents a representative sample of all the blood stains/splatters in the home. The government is not aware of any case in which the examiner was required to test the standard particles of a substance before testifying as to its identity. On the other hand, before one may render an opinion as to what a given substance is, the courts have uniformly required that a representative sample of the substance be tested and positively proved to be what the examiner claims. Approximately 1,000 splatters found on the household goods and in the quarters of the accused indicated the presence of blood. A representative sampling showed 162 of these stains were human blood. Moreover, one blood scraping was sufficient for typing and showed the presence of human blood, Group O, PGM 1+, the blood type and PGM factor of the victim. This representative sampling, taken from all areas of the home and household goods, is a sufficient foundation for the admissibility of the evidence. Any deficiency in the quality of the evidence is a matter going to weight, not admissibility. Defense counsel will have an opportunity to cross-examine the government's experts to point out the deficiencies of this evidence.

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[8]4 M.J. 761 (A.C.M.R. 1977).

[9]Saltzburg, *supra* note 7, at 179.

[10]*See* United States v. Russell, 15 C.M.A. 76, 35 C.M.R. 48 (1964).

[11]*Id.*

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Contents

Supreme Court Review of Decisions by the Court of Military Appeals: The Legislative Background

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Under the Military Justice Act of 1983, the Court of Military Appeals has been placed directly under the Supreme Court for purposes of judicial review.[1] The legislation reflects a continuing effort over the past five years to enhance the stature, stability and effectiveness of the Court of Military Appeals. This article provides a brief overview of the developments that produced this legislation.

I. The Legislative Process

As a result of a detailed study conducted in 1979,[2] the Department of Defense submitted to Congress a legislative proposal which was introduced as the Military Appellate Procedures Act of 1980.[3] The bill contained the following major items:

Statutory independence for the Court of Military Appeals;[4]

Expansion of the Court from three to five members;[5]

Full fifteen year terms for all appointees;[6] and, Supreme Court review of Court of Military Appeals decisions.[7]

A similar bill was introduced by senior members of the House Armed Services and Judiciary Committees, with the additional feature of retirement reform modeled on the retirement

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[1]Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405 (1983).

[2]U.S. Dep't of Defense, Office of General Counsel, REFORM OF THE COURT OF MILITARY APPEALS (May 7, 1979). The primary focus of the report was on doctrinal instability resulting from frequent turnover in the court's membership and lack of clarity in the relationship between CMA and the Article III courts.

[3]H.R. 6298, 96th Cong., 2d Sess. (Jan. 24, 1980), reprinted in *Revision of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process: Hearings on H.R. 6406 and H.R. 6298 Before the Military Personnel Subcomm. of the House Armed Services Comm.*, 96th Cong., 2d Sess. 26 (1980) [hereinafter cited as 1980 House Hearings]. The letter transmitting the legislation from the Department of Defense to the Congress on January 2, 1980 appears at H.R. Rep. No. 1412, 96th Cong., 2d Sess. 11-13 (1980) [hereinafter cited as 1980 House Report].

[4]The Court of Military Appeals is "located for administrative purposes only in the Department of Defense. . . ." Uniform Code of Military Justice art. 67(a)(1) 10 U.S.C. § 867(a)(1) (1982) [hereinafter cited as UCMJ]. *See* 1980 House Report, *supra* note 3, at 4; 1980 House Hearings, *supra* note 3, at 53, 56 (testimony of Robert L. Gilliat, Assistant General Counsel, Dep't of Defense).

[5]*See* UCMJ art. 67(a)(1); 1980 House Report, *supra* note 3, at 3, 12; 1980 Hearings, *supra* note 3, at 53, 56.

[6]Under the law then in effect, if a member of the court left office prior to completing a 15-year term, the individual appointed to fill the vacancy served on the court only for the unexpired balance of the predecessor's term. *See* 1980 House Report, *supra* note 3, at 3, 12; 1980 House Hearings, *supra* note 3, at 53, 56.

[7]*See* 1980 House Report, *supra* note 3, at 3-4, 10-13; 1980 House Hearings, *supra* note 3, at 51-57. *See infra* text accompanying note 27 with respect to limitations on the types of cases subject to direct Supreme Court review under this proposal.

system applicable to members of the Tax Court.[8] After making several minor amendments and deferring action on the retirement provisions, the legislation was reported favorably by the Armed Services Committee[9] and approved by the House of Representatives without dissent.[10]

Because the bill did not reach the Senate until late in the year, the Senate was unable to take up the proposal in the 96th Congress. However, an amendment to a separate bill was enacted at the end of 1980 providing full fifteen-year terms for all new appointees to the Court of Military Appeals.[11] After 1980, the size and status of the court, as well as the nature of its retirement system, have received continued attention from the Department of Defense and the Congress.[12]

In the 97th Congress, the Department of Defense combined a revised set of amendments concerning Supreme Court review with a separate group of proposals containing substantial revisions of pretrial, trial and post-trial procedures.[13] The Senate Armed Services Committee held hearings on this proposal and on a similar bill in late 1982.[14] At the beginning of the 98th Congress, the Committee approved a comprehensive set of amendments to the Uniform Code of Military Justice, including the authorization for Supreme Court review.[15] This was approved by the full Senate on April 28, 1983.[16] After hearings by the House Armed Services Committee,[17] the bill was reported favorably with a number of technical amendments[18] and was approved by the House on November 16, 1983.[19] Two days later, the Senate accepted the House amendments, obviating the need for a conference,[20] and the President approved the legislation on December 6, 1983.[21]

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[8]H.R. 6406, 96th Cong., 2d Sess. (Feb. 5, 1980), *reprinted in* 1980 House Hearings, *supra* note 3, at 3. *See* 1980 House Hearings, *supra* note 3, at 81-85 (testimony of William H. Cook, Judge of the Court of Military Appeals).

[9]*See* 1980 House Report, *supra* note 3, at 4-5. The subcommittee mark-up is set forth in the 1980 House Hearings, *supra* note 3, at 97-117. The revised version was reported out as a new bill, H.R. 8188.

[10]126 Cong. Rec. 29,013 (1980).

[11]Military Pay and Allowances Benefits Act of 1980, Pub. L. No. 96-579, § 12(a), 94 Stat. 3359, 3369 (1980).

[12]Although the Department of Defense has continued to support a five member court, the Department in 1982 offered the following explanation for not introducing such legislation in the 97th Congress: "The goal of the 5-member court is stability in the Court's membership. . . . We have had a stable court since 1980, and the earliest that the term of any of the present judges will expire is 1986. Although we continue to believe that a 5-judge court is desirable, we do not think that the composition of the court should be changed until there is a vacancy on the court. To increase the size of the Court before then would be to introduce the very instability we are trying to avoid." *Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services*, 97th Cong., 2d Sess. 79 (1982) (testimony of William H. Taft IV, General Counsel, Dep't of Defense) [hereinafter cited as 1982 Senate Hearings].

Likewise, the Department has continued to support complete statutory independence of the Court of Military Appeals from the Department of Defense; however, the court did not ask the Department to reintroduce the legislation. *See id.* In a related development, the study commission established by the Military Justice Act of 1983, Pub. L. No. 98-209, § 9, 97 Stat. 1393, 1404 (1983), is considering whether the court should be given Article III status. *See* H.R. Rep. No. 549, 98th Cong., 1st Sess. 17 (1983) [hereinafter cited as 1983 House Report].

With respect to retirement reform, a modest improvement was enacted in the Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1256(a), 97 Stat. 614, 701 (1983). In addition, the study commission established under the Military Justice Act of 1983 is required to make recommendations concerning what should be the elements of a fair and equitable retirement system for the judges of the Court of Military Appeals.

[13]Letter from William H. Taft IV, General Counsel, Department of Defense, to Thomas P. O'Neill, Speaker of the House, Aug. 12, 1982.

[14]1982 Senate Hearings, *supra* note 12. S. 2521 did not contain legislation concerning Supreme Court review.

[15]S. 974, 98th Cong., 1st Sess. (1983); S. Rep. No. 53, 98th Cong., 1st Sess. (1983) [hereinafter cited as 1983 Senate Report].

[16]129 Cong. Rec. S 5611-18 (daily ed. Apr. 28, 1983).

[17]*Hearings on S. 974 Before the Military Personnel and Compensation Subcomm. of the House Comm. on Armed Services*, 98th Cong., 1st Sess. (1983) [hereinafter cited as 1983 House Hearings].

[18]1983 House Report, *supra* note 12.

[19]129 Cong. Rec. H 10021-26 (daily ed. Nov. 16, 1983).

[20]129 Cong. Rec. S 16832-37 (daily ed. Nov. 18, 1983).

[21]*See supra* note 1.

II. Purpose and Scope of Supreme Court Review

Under the new legislation, the Supreme Court may review decisions of the Court of Military Appeals by granting petitions for writs of certiorari.[22] The amendments permitting direct Supreme Court review of Court of Military Appeals decisions were designed to meet two concerns: first, the burden imposed on an accused by the costly and time-consuming process of attempting to reach the Supreme Court through collateral review of a court-martial conviction; and second, the absence of any authority for the government to obtain review of the decisions of the Court of Military Appeals.[23]

Under the new legislation, there are limits governing eligibility of cases filed with the Court of Military Appeals for review on certiorari by the Supreme Court. Although the Department of Defense initially proposed that the Supreme Court be given jurisdiction to review all cases within the jurisdiction of the Court of Military Appeals,[24] that proposal was modified at the request of the Department of Justice to narrow such authority.[25]

According to the 1983 Senate Report, the new legislation authorizes discretionary review by the Supreme Court of the following categories of cases:

> Cases reviewed by the Court of Military Appeals under its mandatory review of death sentences affirmed by a Court of Military Review (Article 67(b)(1));
>
> Cases certified to the Court of Military Appeals from a Court of Military Review by the Judge Advocate General;
>
> Cases for which the Court of Military Appeals has granted review under Article 67(b)(3); and
>
> Other cases in which the Court of Military Appeals has granted relief.[26]

Moreover, under Article 67(h)(1), review by the Supreme Court will not extend to cases where the Court of Military Appeals has refused to grant a petition for review. These limitations reflect the considerable attention accorded during the legislative process to the impact of the legislation on the Supreme Court's docket.[27]

Because review is by petition for writ of certiorari, the Supreme Court has complete discretion in selecting cases for review.[28] The legis-

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[22]28 U.S.C.A. § 1259 (West Supp. 1984); UCMJ art. 67(h). This provision of the Military Justice Act of 1983 became effective on August 1, 1984. Pub. L. No. 98-209, § 12(1), 97 Stat. 1393, 1407 (1983). The Senate Armed Services Committee noted in its report: "The [Supreme] Court may initiate. . . direct review at any time on or after [August 1, 1984]. . . . The legislation contemplates review of decisions from the Court of Military Appeals that are issued prior to that date; but the precise details will depend on rules issued by the Supreme Court governing submission of petitions for review." 1983 Senate Report, *supra* note 15, at 37.

[23]*E.g.*, Letter from L. Niederlehner, Acting General Counsel, Dep't of Defense, to the Speaker of the House, January 2, 1980, reprinted in 1980 House Report, *supra* note 3, at 12-13; 1980 House Hearings, *supra* note 3, at 52-53, 55-56 (testimony of Robert L. Gilliat, Assistant General Counsel, Dep't of Defense); 1980 House Report, *supra* note 3, at 12-13; 1982 Letter to the Speaker of the House, *supra* note 13; 1982 Senate Hearings, *supra* note 12, at 20, 28-29, 38-40 (testimony of William H. Taft IV, General Counsel, Dep't of Defense); 1983 Senate Report, *supra* note 15, at 8-9, 32-33; 129 Cong. Rec. S 5613-14 (daily ed. Apr. 28, 1983) (remarks of Sen. Jepsen); 1983 House Hearing, *supra* note 18, at 41 (testimony of William H. Taft IV, General Counsel, Department of Defense). 1983 House Report, *supra* note 12, at 16; 129 Cong. Rec. H 10026 (daily ed. Nov. 16, 1983) (remarks of Rep. Montgomery and Rep. Hillis).

[24]Letter from Graham Claytor, Deputy Secretary of Defense to James T. McIntyre, Jr., Director, Office of Management and Budget, Oct. 30, 1979.

[25]*See* 1980 House Report, *supra* note 3, at 10.

[26]1983 Senate Report, *supra* note 15, at 34-35.

[27]*E.G.*, 1980 House Hearings, *supra* note 3, at 57-58, 66-67 (testimony of Robert L. Gilliat, Assistant General Counsel, Dep't of Defense); 1980 House Report, *supra* note 3, at 4, 10; 1982 Senate Hearings, *supra* note 12, at 21, 39-40, 82-84 (testimony of William H. Taft IV, General Counsel, Dep't of Defense); 1983 Senate Report, *supra* note 15, at 9-11, 33-35; 129 Cong. Rec. S 5614 (daily ed. Apr. 28 1983) (remarks of Sen. Jepsen); 1983 House Hearing, *supra* note 17, at 41 (testimony of William H. Taft, IV, General Counsel, Dep't of Defense); 1983 House Report, *supra* note 12, at 17.

[28]*See* Sup. Ct. R. 17.

lation does not expressly limit the scope of review in cases that fall within the review provisions and, additionally, the legislative history illustrates potential jurisdiction over rulings by the Court of Military Appeals on constitutional, statutory and regulatory issues.[29] However, the legislative history also contains significant statements about the importance of preserving the Court of Military Appeals as the primary arbiter of military law.[30] Although such observations do not limit the Supreme Court's authority to review cases within its new jurisdiction, they may be of importance in the decision as to whether certiorari should be granted and, if granted, to what degree deference should be given to the decisions of the Court of Military Appeals. These considerations will be of particular significance with respect to review of matters not addressed fully in the decision of the Court of Military Appeals.

III. Collateral Review

Because the Court of Military Appeals' statutory jurisdiction is limited to cases involving the death penalty, a punitive discharge or confinement for one year or more,[31] and because the Supreme Court will have direct review jurisdiction of those cases only if actually reviewed by the Court of Military Appeals,[32] many cases within the military justice system will not be subject to Supreme Court review under the new legislation.[33] Such cases remain subject to consideration in the Article III courts through existing means of collateral review.[34] With respect to cases actually reviewed by the Court of Military Appeals, the Senate Armed Services Committee expressed its intention "that the availability of collateral review of such cases be governed by whatever standards might be applicable to the availability of collateral review of civilian criminal convictions subject to direct Supreme Court review."[35]

IV. Conclusion

This article has summarized the legislative background of the new authority for direct Supreme Court review of decisions by the Court of Military Appeals. The following article in this issue will discuss the specific aspects of the legislative history and its relationship to trial and appellate practice under the Uniform Code of Military Justice. In considering these matters, three themes from the legislative background should be kept in mind:

The legislation was drafted in the context of proposals to enhance the stature, stability, and effectiveness of the Court of Military Appeals.

The new legislation contemplates that the Court of Military Appeals will remain the primary authority on military law.

The new legislation was intended to provide the accused and the government with direct access to the Supreme Court.

Finally, a word of caution in applying the legislative history. Although the legislation involved a great deal of internal consideration

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[29]*E.g.*, Letter from the Acting General Counsel, Dep't of Defense, to the Speaker of the House, Jan. 2, 1980, *reprinted at* 1980 House Report, *supra* note 3, at 12-13; 1980 House Hearings, *supra* note 3, at 52-53, 56 (testimony of Robert L. Gilliat, Assistant General Counsel, Dep't of Defense); 1980 House Report, *supra* note 3, at 4; 1982 Senate Hearings, *supra* note 12, at 20, 28-29, 39, 79-81, 84-85 (testimony of William H. Taft IV, General Counsel, Dep't of Defense); 1983 Senate Report, *supra* note 15, at 8-9, 33-34; House Hearing, *supra* note 17, at 41 (testimony of William H. Taft IV, General Counsel, Dep't of Defense); 1983 House Report, *supra* note 12, at 16; 129 Cong. Rec. S 16837 (daily ed. Nov. 18, 1983) (remarks of Sen. Kennedy).

[30]*E.g.*, 1982 Senate Hearings, *supra* note 12, at 20, 39-40, 79-80 (testimony of William H. Taft IV, General Counsel, Dep't of Defense); 1983 Senate Report, *supra* note 15, at 8, 33; 1983 House Report, *supra* note 18, at 17; 129 Cong. Rec. S. 16837 (daily ed. Nov. 18, 1983) (remarks of Sen. Kennedy).

[31]UCMJ arts. 66(b), 67(b).

[32]*See supra* text accompanying note 26.

[33]To the extent that the Court of Military Appeals grants relief in a case not expressly within its Article 67 jurisdiction (*e.g.*, in an extraordinary writ case), the Supreme Court has direct review jurisdiction under 28 U.S.C.A. § 1259(4) (West Supp. 1984).

[34]*E.g.*, through writs of habeas corpus. *See* 1980 House Hearings, *supra* note 3, at 57 (testimony of Robert L. Gilliat, Assistant General Counsel, Dep't of Defense).

[35]1983 Senate Report, *supra* note 15, at 35.

within the Department of Defense and careful study by the Armed Services Committees, it was relatively noncontroversial, as demonstrated by the absence of contested amendments or recorded votes. In that light, it would be of questionable value to place undue emphasis on isolated statements in the legislative history except to the extent that such matters are consistent with the overall purposes of the legislation.

Military Supreme Court Practice

Prepared by Members of the Defense Appellate Division Under the Direction of Major Robert M. Ott

Military attorneys now have the opportunity to practice before the Supreme Court as a result of the Military Justice Act of 1983.[1] The provisions of the Act pertaining to military practice before the Supreme Court became effective 1 August 1984.[2] Due to the nature of the Court's practice, only the exceptional case will be heard in the Supreme Court. However, petitions for writ of certiorari could be filed as of August 1984.[3]

Practice before the Supreme Court will be legally demanding, highly technical, and administratively burdensome;[4] yet it should prove to be one of the highlights of an attorney's career.

I. Supreme Court Practice by the Military

Representation by Defense Appellate Division Attorneys

Effective 1 August 1984, the Military Justice Act of 1983 created the opportunity for service members to petition the Supreme Court for a writ of certiorari from decisions of the Court of Military Appeals dated 1 June 1984 and later.[5] Appellate military defense counsel "shall" represent the service member in asserting that right.[6] Defense Appellate Division attorneys will perform this function.

Cases Eligible for Petition for Certiorari

In consideration of the Supreme Court's already heavy workload (a factor with important ramifications to the military practitioner

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[1]Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).

[2]*Id.* §12(a)(91).

[3]Sup. Ct. R. 20.1.

[4]Although the Military Justice Act indicates the military will come under the provisions of the Supreme Court Rules for filing *in forma pauperis* (with much less burdensome administrative requirements), the Supreme Court Rules in fact provide only that filing fees are waived for military pleadings and that in all other respects the formal requirements of Rule 33 (Form of Jurisdictional Statements, Petitions, Briefs, Appendices, Motions, and Other Documents Filed with the Court) apply to military practice before the Supreme Court. *See* Sup. Ct. R. 47.3.

For example, the Supreme Court Rules provide for:

(1) specific size type or print,

(2) opaque, unglazed paper sized 6 1/8 by 9 1/4 inches (note that this is a *very unusual size*),

(3) margins of 3/4 inches on all sides,

(4) a "white" cover,

(5) "firmly bound in at least 2 places along the left margin so as to make an easily opened volume, and no part of the text shall be obscured by the binding."

See Sup. Ct. R. 21, 33.

The petition must be submitted to the court in *40* copies. Sup. Ct. R. 21.2.

Meeting the strict administrative requirements of the Supreme Court will be challenging, but the result will be a professional product of the highest caliber. An action attorney will need to anticipate problems and orchestrate the administrative support and processing of the petition from the very beginning, taking into account the great amount of time and resources necessary to complete the administrative work associated with Supreme Court pleadings.

[5]Uniform Code of Military Justice art. 67, 10 U.S.C.A. § 867 (West Supp. 1984) [hereinafter cited as UCMJ].

[6]UCMJ art. 70. It should be noted that civilian counsel may be retained if provided at no expense to the government.

which will be discussed in detail later) and the Court's reluctance to accept an even heavier burden, section 1259 the Act allows a service member to petition for certiorari in the following cases:

Cases reviewed by the Court of Military Appeals under UCMJ art. 67(b)(1);

Cases certified to the Court of Military Appeals by The Judge Advocate General under UCMJ art. 67(b)(2);

Cases in which the Court of Military Appeals granted a petition for review under UCMJ art. 67(b)(3); and

Cases, other than those described above, in which the Court of Military Appeals granted relief.

CMA has granted relief in other cases not listed above. These categories significantly reduce the number of military cases eligible for certiorari.

The following statistical analysis of Army cases in recent years meeting the Act's criteria for certiorari indicate the relatively small number of cases involved:

Death Penalty	CMA Grants	Certified	= Total
FY 1981 0	71	8	79
FY 1982 1	86	8	95
FY 1983 0	122	7	129
FY 1984 0	114*	1**	115

*through April 1984.
**through May 1984.

As the statistics indicate, most opportunities for appeal to the Supreme Court will involve cases in which the Court of Military Appeals has granted a petition for review.

Types of Practice

It is anticipated that military practice before the Supreme Court will involve four basic areas:

Petitioning the Supreme Court for a writ of certiorari, and if granted, briefing and orally arguing the case before the Court;

Responding to government petitions for a writ of certiorari, and, if the government petition is granted, briefing and orally arguing the case on behalf of the respondent accused;

Extraordinary writ practice;

Death penalty practice.

Review of Military Cases by the Supreme Court

Prior to enactment and implementation of the Military Justice Act of 1983, no authority existed under the Uniform Code of Military Justice for either party to seek direct Supreme Court review of decisions by the Court of Military Appeals. The accused could attempt to mount a collateral attack at his or her expense, a costly and difficult venture in view of the limited grounds for collateral review; in addition, the government had no judicial recourse from adverse decisions. The Court of Military Appeals was the only federal judicial body whose decisions were insulated from review by the Supreme Court.

The Act authorizes the parties to petition the Supreme Court to review decisions of the Court of Military Appeals through discretionary writs of certiorari. The concept of Supreme Court review has been indorsed by the House of Delegates of the American Bar Association, the Committee on Military Law of the Association of the Bar of the City of New York, and the American Civil Liberties Union. Control over government petitions will be exercised by the Solicitor General. This control has been indorsed by the Department of Justice as well as the Department of Defense.

Some prior revisions of military criminal law have resulted from grave misgivings about the fundamental fairness and integrity of the military justice system. Thirty-five years ago, for example, the post-World War II Congress had serious concerns about the administration of military justice: all appellate review of courts-martial was conducted within the services, courts-martial were often conducted entirely by non-lawyers, and the issue of command control tainted the image and respectability of trial by court-martial.

In 1983, however, Congress felt that the system was working well as a general notion but

that certain inefficiencies required prompt attention. As a result, Congress streamlined the pretrial and post-trial review process without depriving military members of any of their fundamental rights. It is widely accepted in Congress that the Act's provision for direct appeal to the Supreme Court will enhance the practice and image of criminal litigation in the military.

The potential for an accused to appeal to the Supreme Court is limited only by the desires of the accused, the ethical limitations of counsel, and the limitations written into the Military Justice Act of 1983. As a practical matter, however, rarely will the Supreme Court grant review in a military appeal.

II. "Certworthy" Cases and Issues

Introduction

Assuming that a military case is eligible for Supreme Court review, it must be understood that granting the writ of certiorari is entirely discretionary with the Court; it is *not* a matter of right. The Court's certiorari practice began in 1925 as a drastically needed reform to give the Court flexible but firm control over the nature and volume of its work.[7] Even so, the number of petitions submitted to the Court is staggering and is increasing each year. Statistics compiled by the Clerk of the Supreme Court for the 1967, 1976, and 1983 Terms illustrate the ever increasing number of petitions filed:

Term Year	Number of petitions	Number granted	%
1967	2566	121	4.7
1976	3622	116	3.2
1983	4745	147	3.0

The procedure the Court utilizes in processing petitions for certiorari is discussed later in detail, but counsel preparing petitions need to understand the small amount of time available to the Court to review the petitions. Most of the Justices rely on the law clerks' memoranda which usually are three-to-five page summaries of the petition, the opposing brief and the previous opinions. In a 1959 article, Professor Hart estimated that a Justice spent no more than ten minutes on a certiorari petition.[8] Since 1959, however, the case load of the Court has almost tripled. Thus, it is likely today that most petitions receive less attention. Hence, there is an absolute need for precision, brevity, and clarity in crafting the petition.

Identification of "Certworthy" Cases and Issues

General Considerations

In the guidance that follows regarding the identification of "certworthy" issues (issues upon which the Supreme Court is likely to grant a petition for certiorari, assuming one has an eligible case), counsel should clearly keep in mind the factors used by the Court in deciding which petitions to grant. As pointed out in *Supreme Court Practice*,[9] "these factors apparently are not fully appreciated, for year in and year out. . . 95 percent of the petitions for certiorari are denied, with the proportion of denials steadily increasing."[10] The largest part of the problem is the attorney's misunderstanding of the purpose and function of the Supreme Court. The proper perspective was expressed by Chief Justice Vinson in 1949 and is still valid today:

> During the past term of Court, only about 15% of the petitions for certiorari were granted, and this figure itself is considerably higher than the average in recent years. While a great many of the 85% that were denied were far from frivolous, far too many reveal a serious misconception on the part of counsel concerning the role of the Supreme Court in our federal system. I should like, therefore, to turn to that subject very briefly.

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[7]Judiciary Act of February 13, 1925, Pub. L. No. 68-415, 43 Stat. 936 (1925).

[8]Hart, *Forward: The Time Chart of the Justices*, 73 Harv. L. Rev. 84 (1959). The amount of time a Justice spent on a non-frivolous petition was adjusted even further downward by Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. Legal Studies 339, 363 (1974).

[9]R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978).

[10]*Id.* at 257 (citing Report of the Study Group on the Case Load of the Supreme Court (Federal Judicial Center 1972)).

The Supreme Court is not, and never has been primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, "to secure the national rights & uniformity of Judgments." The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts.

If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country.[11]

Early Identification of "Certworthy" Issues Is Essential

At both the trial and appellate level, counsel should strive to identify and fully develop "certworthy" issues as early as possible. This is the key to obtaining a grant of certiorari. Following are guidelines to assist in measuring a particular issue to determine its "certworthiness."

Factors that Constitute "Certworthiness"

Rule 17

In Supreme Court Rule 17.1, the Court articulates several categories which are illustrative of the factors it will consider in the exercise of its discretion to grant petitions for writs of certiorari:

(1) One federal court of appeals is in conflict with another federal court of appeals on the same matter.

(2) A federal court of appeals has decided a federal question in a way different than a state court of last resort.

(3) A federal court of appeals departs so substantially from the usual and accepted course of judicial proceedings or allowed a lower court to do so that the Supreme Court must exercise its supervisory powers.

(4) A state court of last resort has decided a federal question in conflict with other state courts of last resort or a federal court of appeals.

(5) Either a state court of last resort or a federal court of appeals decides an important question of federal law which has not been, but should be, settled by the Supreme Court.

(6) Either a state court of last resort or a federal court of appeals decides a federal question in conflict with a decision of the Supreme Court.

It is suggested that Rule 17, in essence, provides three factors that motivate the Court to exercise its certiorari jurisdiction: conflicts between courts, the need to exercise supervisory power over the federal courts, and the existence of a federal question. Note, however, that the Rule distinguishes the application of the factors be-

[11]Address of Chief Justice Fred M. Vinson to the American Bar Association, St. Louis, MO Sept. 7, 1949. Note that only 3% of the petitions were granted in the 1983 Term. 69 S.Ct. VI (1949).

tween the federal court system and the state court system.

Conflicts between courts appear to be the most basic factor moving the Court to grant certiorari. There is a significant difference in the application of this factor between the federal and state court systems. The existence of any conflict over the same matter between federal courts of appeals is a motivating factor. If the case arises from a state court, however, more than just a conflict is needed. The conflict must involve a *federal question*, regardless of whether the conflict is between state courts, or between a state court and a federal court of appeals. Remember, the Supreme Court exercises supervisory power only over the federal court system.

A conflict between courts concerning a federal question, regardless of the courts involved, is another factor motivating the Supreme Court to grant certiorari. Furthermore, an important federal question decided by any court, which has not yet been, but should be, decided by the Supreme Court is also a factor motivating certiorari jurisdiction.

The Factors Constituting "Certworthiness" and the Court of Military Appeals

Supreme Court Rule 17.1 distinguishes the application of the three factors motivating a grant of certiorari between the federal and state court systems. Specifically, the Rule refers only to the federal courts of appeals and the state courts of last resort. The Court of Military Appeals is clearly neither. In what category will the Supreme Court place the Court of Military Appeals? A federal court of appeals or a state court of last resort? The answer is obviously important to determine which factors motivating the Court to grant certiorari are applicable to military practice before the Supreme Court. The answer to this question is not entirely clear. The 1984 amendments to the Supreme Court Rules state that petitions arising out of the Court of Military Appeals will be judged by the same standards as petitions arising from a federal court of appeals and a state court of last resort.[12] Counsel should be cautious, however, in applying the Rule literally for there are problems in analogizing the Court of Military Appeals too closely with the factors the Court considers important in granting certiorari in *federal* cases. It is likely that the Court of Military Appeals is a hybrid and that for some purposes, *e.g.*, pleading requirements, the Court of Military Appeals will be likened to a federal court of appeals[13] but for other purposes, *e.g.*, the factors that will motivate the Supreme Court to grant certiorari, the Supreme Court will treat the Court of Military Appeals like a state court of last resort. This position is explained in more detail below using the three factors motivating the Supreme Court to grant certiorari: conflicts between courts, exercise of supervisory power over the lower federal courts and the existence of a federal question.

Conflicts Between Courts

As noted, the amended Supreme Court Rules provide that the same general considerations outlined in Rule 17.1 "will control in respect to petitions for writs of certiorari to review judgments of. . . the United States Court of Military Appeals. . ."[14] Those factors include conflicts between decisions of the federal courts of appeals. It is extremely doubtful, however, whether a decision of the Court of Military Appeals in conflict on any point with any other federal court of appeals will alone cause the Supreme Court to grant certiorari. First, decisions of the federal courts of appeals apply to and involve a much wider segment of society and a far larger number of people than the relatively limited application of Court of Military Appeals decisions. Accordingly, the significance of a Court of Military Appeals decision is of far more limited application than a federal court decision. Second, the issues themselves may very well be peculiar to the military, especially in the context in which they arise. The Supreme Court has recognized that the military is a separate society from the civilian society,[15]

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[12]Sup. Ct. R. 17.2.

[13]*See, e.g.*, Sup. Ct. R. 21.1(h), (i).

[14]Sup. Ct. R. 17.2.

[15]*See* Reid v. Covert, 354 U.S. 1 (1957); Burns v. Wilson, 346 U.S. 137, *reh'g denied*, 346 U.S. 844 (1953); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

and as such it will not feel compelled to bring the Court of Military Appeals into line with the decisions of the other federal courts of appeals on the basis of conflict alone. In other words, military necessity may well justify the military having a rule in conflict with any or all the federal courts of appeal.

Exercise of Supervisory Powers

It is unlikely that the Supreme Court will exercise its supervisory powers over the Court of Military Appeals. The Court, already overburdened, probably will not want to get involved with supervision of military courts.

Existence of a Federal Question

Looking at Supreme Court Rule 17, grants of certiorari are most likely when a substantial federal question is present, whether the issue arises in state or federal court.

> Crucial to the exercise of our certiorari jurisdiction is whether the controlling issue in the state court is a federal issue, that is, an issue arising under the United States Constitution or under federal laws or treaties. But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed. First, the federal question must be a substantial question. Second, the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. Third, even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law.[16]

The Critical Factor—A Substantial Federal Question

It would appear at first blush that since the soverign authority behind a court-martial is the United States Government, virtually all issues presented to the Supreme Court would involve a "federal question." Attractive though this analysis might seem, it is unlikely that the Supreme Court will treat military cases so broadly.

In the context of military law, substantial federal questions are likely to appear in two forms: an interpretation of federal laws or treaties or application of the United States Constitution. Furthermore, to be viable, the federal question must not be frivolous nor foreclosed by prior decisions of the Supreme Court.[17] A federal question which does not meet these standards is deemed insubstantial and is cause for denial of a petition for writ of certiorari.[18] The case which involves an important federal question will be more likely to have greater effect and impact upon society. An assessment of how "important" the federal question involved is will probably be the most critical factor persuading the Supreme Court to grant certiorari in military cases.

The Supreme Court will not ordinarily grant certiorari in cases where an adequate "state" basis for a decision exists. In the military context this will probably include provisions in the Manual for Courts-Martial and service and local regulations. If there is a unique military basis for affirming the Court of Military Appeals decision, the Supreme Court will likely defer to that court's interpretation. Recent decisions of the Supreme Court reemphasize its belief that the military courts possess a special competence to deal with issues unique to the military.[19]

If an independent military basis for a Court of Military Appeals decision exists, counsel must attempt to attack the underlying validity of the military authority. Such an attack may focus on procedural defects in the creation of the military authority, the constitutionality of the provision or an inequitable application of the military authority.

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[16]Brennan, *State Court Decisions and the Supreme Court*, 31 Penn B.A.Q. 393, 399-400 (1960).

[17]Stern & Gressman, *supra* note 9, at 208 (citing Equitable Life Insurance Society v. Brown, 187 U.S. 308, 311 (1902)).

[18]*Id.* at 208 (citing Palmer Oil Corp. v. Anerada Corp., 343 U.S. 390 (1952)).

[19]*See, e.g., Chappel v. Wallace*, 103 S. Ct. 2362 (1983); *Schlesinger v. Councilman*, 420 U.S. 738 (1975).

Where the military basis conflicts with provisions of the Constitution, the avenue of attack is more obvious. Counsel should highlight applicable Supreme Court interpretations of the relevant constitutional provision and illustrate how the military provision conflicts with the Constitution. Counsel would be well advised to attempt to establish that no rational basis exists to apply the relevant constitutional provision differently in the military because of the recognized exigencies of military service.

For the Supreme Court to grant review in a case where a "federal question" is presented, it is absolutely critical that the federal question be sufficiently and properly raised in the courts below. In military practice, the substantial federal question must be properly framed and litigated at the trial and intermediate appellate levels.

> If you are about to commence litigation (at the trial level) in which there may be involved, then or ultimately, a question arising under the Constitution or laws of the United States, you must raise the federal question at the outset and not as an afterthought after you have lost below. . . unless you build the record in your [trial level] litigation. . . you not only do *not* have a rosy chance of review [by the Supreme Court], you don't have any chance at all.[20]

An 1836 Supreme Court decision held that before the Court could take jurisdiction of a state case, the federal claim must have been both *raised* in and *addressed* by the lower court.[21] This rule, however, has not been strictly enforced in the past. Especially in state court criminal cases,[22] the Court has described the "so called 'not pressed or passed upon below' rule as merely a prudential restriction."[23] The question must also be raised and decided in cases arising in the federal courts:

> But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in *exceptional cases*, and then only in cases *coming from the federal courts*, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. . . .[24]

Thus it appears that although failing to raise the issue below is not a jurisdictional defect, the Supreme Court is very reluctant to take a case where the issue has not been fully litigated below and that this reluctance is growing stronger.[25]

Although a particular format in framing a federal question is not required, the issue must be presented to the trial court with particularity "so distinct and positive as to place it beyond question that the party bringing the case. . . intended to assert a federal right."[26] It is essential to cite accurately and with specificity the provision of the Constitution or federal law relied upon.

A Look at Supreme Court Cases Involving "Military" Issues

When determining whether an issue is "certworthy," it may be helpful to examine actions of the Supreme Court denying or granting review. Such an examination sometimes reveals what issues the Court has expressed interest in deciding and what issues the Court has refused

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[20]Wiener, *Wanna Make a Federal Case Out of It?* 48 A.B.A.J. 59, 60, 62 (1962).

[21]Cornwell v. Randell, 35 U.S. (10 Pet.) 368, 391 (1836).

[22]*See* Vachon v. New Hampshire, 414 U.S. 478 (1974); Terminiello v. Chicago, 337 U.S. 1 (1949).

[23]Illinois v. Gates, 103 S. Ct. 2317 (1983).

[24]McGoldrick V. Compagnie Generale, 390 U.S. 430, 435-36 (1940).

[25]For example, in Illinois v. Gates, 103 S. Ct. at 2321, the Supreme Court, "with apologies to all," decided that the issue the Court framed for the parties (a good faith exception to the exclusionary rule) had not been presented to the Illinois courts, and, therefore, that specific issue would *not* be decided that day, and decided only the issues properly raised below. This decision may well indicate the Court's intention to return to the stricter application of the rule that only issues fully litigated below will be considered at Supreme Court level.

[26]Oxley Stove Co. v. Butler County, 166 U.S. 648, 655 (1897).

to decide. Looking at similar cases may also give counsel a clue as to which Justice or Justices may be sympathetic to a particular issue. When cases are examined for purposes of identifying "certworthy" issues, the practitioner must keep the context of the Court's action in mind. Counsel must be aware that review by the Supreme Court of military cases under the Military Justice Act of 1983 is novel and that the Court has only considered military cases in the past after some round-about litigation. Thus, although examination of other cases may be helpful, counsel should not believe that they are dispositive of the question, "Will the Court consider this issue?"

A review of some of the cases involving "military" issues decided by the Supreme Court since 1970 follows. In many of these cases, military issues were only peripheral to the underlying opinion. They do, however, illustrate some of the concerns of the Court.

Chappell v. Wallace, 103 S.Ct. 2362, 76 L. Ed.2d 586 (1983):
Can service members sue their commanding officers for discrimination under a constitutional tort theory? The Supreme Court noted the separate military remedies and safeguards built into the military justice system.

United States v. MacDonald, 456 U.S. 1 (1982):
Was petitioner denied his right to speedy trial and did the delay deny him his right to due process? This is not really a military case but does highlight important constitutional issues and their interface with the military justice system.

McCarty v. McCarty, 453 U.S. 210 (1981):
Should military retirement pay be treated as community property upon dissolution of a marriage? Not a military justice case, but it does involve a conflict between state and federal law and the interpretation of a federal statute.

Rostker v. Goldberg, 453 U.S. 57 (1981):
Does the Selective Service Act violate the equal protection clause because it only applies to males? The Court specifically stated that while Congress may not disregard the constitution, the Court will give great deference to Congress' judgment regarding defense and military affairs.

Brown v. Glines, 444 U.S. 348 (1980):
Does an Air Force regulation requiring the commander's prior approval for a service member to circulate a petition addressed to members of Congress violate the first amendment? The Court discussed the needs of the service in maintaining discipline and enforcing authority of superiors.

Secretary of the Navy v. Huff, 444 U.S. 453 (1980):
Same issue (Navy regulation) and result as in *Brown v. Glines*.

Department of the Air Force v. Rose, 425 U.S. 352 (1976):
Does the Freedom of Information Act require disclosure to law review editors of confidential files relating to disciplinary proceedings at the U.S. Air Force Academy? Not a military justice case but it does involve a question of federal law.

Middendorf v. Henry, 425 U.S. 25 (1976):
Is a trial by a summary court-martial a denial of due process? Court required minimum due process in disciplinary proceedings in the military.

McLucas v. DeChamplain, 421 U.S. 21 (1975):
Successful appeal by the government from a lower court injunction preventing DeChamplain's court-martial. Lower court had ruled that Article 134 was unconstitutionally vague.

Schlesinger v. Councilman, 420 U.S. 738 (1975):
Whether federal court may enjoin the military from trying a soldier for offenses which are not service connected. Court deferred to the judgment of the military courts and their special expertise.

Schick v. Reed, 419 U.S. 256 (1974):
Whether President's commutation of a military death sentence which provided that the prisoner would be ineligible for parole was proper. Not a military justice case, but the Court examined the President's constitutional powers.

Secretary of the Navy v. Averech, 418 U.S. 676 (1974):

Is Article 134 void for vagueness? Court held that it was not, noting the need for flexibility in maintaining discipline.

Parker v. Levy, 417 U.S. 733 (1974):

Are Articles 133 and 134 void for vagueness? The Court held that they are not, specifically noting that military society is separate and distinct from civilian society.

Gosa v. Mayden, 413 U.S. 665 (1973):

Did the petitioner's court-martial have subject matter jurisdiction? The Court examined the retroactive application of the service connection doctrine.

Parisi v. Davidson, 405 U.S. 34 (1972):

May petitioner seek a writ of habeas corpus even though a court-martial is pending? Decision limited to the question of whether the lower court's decisions dismissing habeas petition was proper where petitioner, a conscientious objector, was pending court-martial and where his status could be interposed as a defense.

Relford v. Commandant, 401 U.S. 355 (1971):

Did the petitioner's court-martial lack subject matter jurisdiction? Court articulated standards for court-martial jurisdiction.

Jones v. United States, 419 U.S. 907 (1974):

This is a case where certiorari was denied to a service member seeking to collaterally attack his court-martial conviction. It is included because Justice Douglas filed a scathing dissent.

III. How the Supreme Court Handles Petitions for Certiorari

After the petition for certiorari is filed in the Clerk's office, the petition is held until either the respondent's brief in opposition is filed or until the expiration of the time to file the brief in opposition. On the following Monday (petitions filed with the $200 fee) or Thursday (petitions filed *in forma pauperis*), the Clerk's office distributes the petition and any brief in opposition or reply brief to the chambers of each of the nine Justices. The Court will consider the petition about ten days later at a "Friday Conference."

Once the documents reach a Justice's chambers, the usual practice in each of the chambers is for a law clerk to read the documents and prepare a three-to-five-page memorandum, in effect, a screening mechanism to drastically reduce the amount of time a Justice need spend on certiorari petitions. Justice Brennan, however, apparently does not delegate the task to his clerks, but considers each petition himself, except during the summer months when he allows his clerks to review and summarize the petitions awaiting the beginning of the October Term; the petitions in a sense serve as a training device for his new clerks.[27]

Around 1972, five of the Justices began pooling their law clerks for the certiorari work. Under this method, rather than producing five separate memoranda for the same petition, the law clerks are pooled and each petition is assigned to a single law clerk who is responsible for producing the memorandum that is distributed to all five Justices. It is not entirely clear whether the "cert pool" still operates, but it is believed that the Chief Justice and Justices Blackmun, Powell, Rehnquist and White still utilize the "cert pool" system.[28]

Justice Brennan apparently finds little difficulty deciding the cases in which he is going to vote to grant certiorari: "In a substantial percentage of cases I find that I need read only the 'Questions Presented' to decide how I will dispose of the case."[29] Usually, the other Justices refer first to their law clerk's memorandum, and if that is dispositive for either a "grant" or "deny" vote, the Justice will go no further. If not, the Justice will likely then read the petition and opposing brief but only to the extent necessary.

Although it is clear that much of the initial

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[27]Stern & Gressman, *supra* note 9, at 340 (citing Brennan, *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473, 477-78 (1973)).

[28]Stern & Gressman, *supra* note 9. *See also* B. Woodward & S. Armstrong, The Brethren: Inside the Supreme Court 272 (1980). This book provides an interesting, yet unofficial, view of the inner workings of the Supreme Court.

[29]Brennan, *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473, 477-78 (1973).

work is delegated to the law clerks, it is also apparent that each Justice feels responsible for making a personal judgment on each petition filed. This personal decision is made prior to the Friday Conference, without consulting the other Justices.

As the ten days for consideration of the petition and other filed documents elapse, an agenda is prepared for the scheduled Friday Conference. Any Justice may request that a particular petition be "stricken" and "laid-over" so more time may be provided to study the petition.

Several days before the Friday Conference, the Chief Justice circulates a "discuss list" that lists the petitions on the agenda he thinks are worthy of discussion on whether or not to grant certiorari. Any Justice may add the name of a petition deemed worthy of discussion to the list. The effect of a petition not making the list is an automatic denial of that petition (about 70% fail to make the discuss list). Should a petition make the discuss list, there is still no guarantee it will be granted, for most petitions making the list fail to get the four votes required for a grant of certiorari.

At the Friday Conference, the Justices vote on each petition listed on that week's Conference List. When the business moves to the petitions for certiorari, the Chief Justice briefly states the facts and issues in each petition on the discuss list and concludes by giving his recommendation to grant or deny the petition. Each Justice, in order of seniority from the senior to the junior, is then given an opportunity to discuss the petition. The order is not broken and the speaker not interrupted. After each Justice has had an opportunity to speak, the voting begins with the junior Justice and moves by seniority, in reverse order, to the Chief Justice. It takes four affirmative votes to grant a petition (known as the Rule of Four). On occasions when a Justice is absent and only eight Justices are participating, the Rule of Four is not relaxed. It is unclear, but on the rare occasion when the number of Justices is reduced to seven, it appears certiorari may have been granted in the past with only three affirmative votes. This is probably not the case anymore, and four votes is the minimum to grant certiorari. Justice Stewart has claimed that "the 'Rule of Four' is. . . an absolutely inflexible rule."[30] Only the Justices are present at these conferences; there are no clerks, reporters, or secretaries. The work is done in great privacy; some would say secrecy. The actual vote on the petition, *i.e.*, the numbers voting yes and no, is not announced. The only announcement is that the petition is granted or denied. Reasons for granting or denying a petition are normally not announced, although on occasion, where the dissenters have strong feelings, a dissent will be issued. The orthodox view is that denial of certiorari is *not* an expression of the Supreme Court's view of the correctness of the decision below. Hence, a denial of the certiorari is *not* a precedent for a similar decision in a similar case. As Justice Frankfurter stated some years ago:

> We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.[31]

There is today some disagreement with the orthodox view, especially with the recent growth in the number of dissents from certiorari denials which make increasing reference to the underlying merit of the decision below. One commentator believes it is "time to stop pretending that denial of certiorari means nothing."[32] He suggests that when six Justices decline to vote to grant certiorari on an issue of obvious national importance or involving a clear conflict among the federal appellate courts, and especially when there is a dissent from the denial of the certiorari on the merits of the decision

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[30]*See* Stewart, *Inside the Supreme Court*, N.Y. Times, Oct. 1, 1979, at A17.

[31]Brown v. Allen, 344 U.S. 443, 492 (1953).

[32]Linzer, *The Meaning of Certiorari Denials*, 79 Colum. L. Rev. 1227, 1304 (1980).

below, it cannot be explained away as meaningless. Nevertheless, Professor Linzer agrees that "wise litigants" do not cite cert denials to bolster their arguments.[33]

On the Monday following the Friday Conference, an order is entered granting or denying the petitions considered. Occasionally, a petition will be held in abeyance, usually awaiting the outcome of a pending decision that would be controlling on the issues raised in the petition.

IV. Conclusion

Early identification of those issues which may be presented to the Supreme Court is critical. An examination of cases where certiorari has been granted demonstrates that before the Court will consider an issue, it must be fully and adequately litigated both at the trial and intermediate appellate courts. Counsel practicing at the trial level, as well as counsel practicing before the Army Court of Military Review and the Court of Military Appeals, must be aggressive litigators. The trial counsel, in particular must not only litigate the legal issues at trial but must also develop fully the factual predicate upon which the legal question turns.

It is anticipated that the Supreme Court will consider the Court of Military Appeals to be a hybrid between a federal court of appeals and a state court of last resort. In terms of obtaining a grant of certiorari, however, the Court of Military Appeals will be likened to a state court of last resort. Thus, the importance of the federal question involved, if any, will probably be the critical factor in determining the "certworthiness" of a military case.

Until the Supreme Court offers more guidance than set forth in the Supreme Court Rules, the question of which issues are "certworthy" will be largely a matter of guesswork. Applying the guidelines suggested here and discerning those guidelines which are revealed by experience will permit counsel to litigate those issues with the best chance of a successful outcome for the client.

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[33] *Id.*

Judiciary Notes

US Army Legal Services Agency

Promulgating Orders and Convening Authority Actions

Predictably, some problems have arisen in the early days of operating under the 1984 Manual for Courts-Martial with promulgating orders and convening authority actions. As a matter of practice, the promulgating order summary of each specification should include the date of the offense. Although not specifically required by the Manual, Appendix 17 suggests by its illustration that the date is required. Figure 12-1 of AR 27-10 will require the date in the next revision. Above all, however, do not forget to include all factors affecting the maximum authorized punishment (even in SPCM) in the summarized specification.

If the sentence was adjudged before August 1984 (all these cases ought to have been forwarded for review), do not order any part of the sentence executed unless the sentence could have been executed under the 1969 Manual. If the offenses were committed before August 1984 and the approved sentence includes forfeitures without confinement (or with all confinement suspended), do not order the forfeitures executed even if the sentence was adjudged after July 1984 (*see* Message, HQDA, DAJA-CL, 181400Z July 1984, subject: Execution of Forfeitures Under the Military Justice Act).

USALSA Automation News

Automated Legal Research

WESTLAW and LEXIS services now permit off-line printing of cases and other documents. This will save attorney time and reduce the cost to print a document. The disadvantage is that the ease of printing may require greater man-

agement control on ALR use. The off-line printing enhancement also will permit JAGC managers to eliminate additional bound library materials. The variable cost for the service is $.02 per line. The West Publishing Company off-line printing service does not require additional equipment. The Mead Data Central service requires the use of a custom printer and modem which can be leased from Mead for $150 per month. The speed of the Mead printer is superior to most printers currently in use for WESTLAW. The Mead off-line printing option also requires a second data line. Use of the off-line printing option will require modification of your purchase order. To modify LEXIS, you need only send a letter to U.S. Army Corps of Engineers, Attn: M. Counts, 30 Prior Street, S.W., Atlanta, GA 30303, requesting such services. Your contracting officer can modify the purchase order for WESTLAW.

WESTLAW was rated higher than LEXIS in the recent Datapro "User Ratings on Information Retrieval Services." The results of the survey indicate that, based on a weighted average scale of 4.0 for excellent, WESTLAW outscored LEXIS in all categories:

	WESTLAW	LEXIS
Response Time	3.35	3.06
Dependability (up time)	3.55	3.38
Technical/Instructional Support	3.05	2.69
Documentation	3.16	2.40
Ease of Use	3.20	3.14
Cost/Performance Ratio	3.05	2.57
Overall Satisfaction	3.26	2.89

Medical Malpractice Automated Research Databases

The judge advocate addressing a medical malpractice claim must first become familiar with medical terminology. He or she probably will not want to rely solely on Army medical personnel. DIALOG databases which will assist attorneys in reviewing such technology are:

Legal Resource Index

Medline

Excerpta Media (EMBASE)

Drug Information Fulltext

International Pharmaceutical Abstracts

Next, the attorney may need to check WESTLAW and LEXIS for a case with similar facts reported in these automated research databases. Newspapers may also provide a reference to unreported cases where court documents may be useful. NEXIS and DIALOG both contain references to such materials. USALSA is presently evaluating the value of these services for various Army legal functions.

Automation of Trial Defense Service and Trial Judiciary

The Commander, USALSA, has approved a plan to study the applications for automated technology for Trial Defense Service and Trial Judiciary. Army automation policy requires that a complete requirements analysis be conducted of all functions to be performed by the proposed system. A team composed of three representatives from the consulting group and Major John Perrin are administering questionnaires and conducting interviews of selected TJ and TDS personnel. The study team will further refine the information gathered by Colonel Brookshire and the Criminal Justice Information System Plan Study Team. The purpose of the TDS and TJ requirements study is to translate into complete and accurate functional requirements the automation mission support needs of TJ and TDS. For use in system justification and approval, the study will identify cost savings and improved procedures resulting from an automated system. These functional requirements also will be translated into contract specifications for use in acquiring the approved system. USALSA has requested funds in FY 87 for a system for TJ and TDS.

LAMP Committee Report

Captain Thomas W. McShane

ABA Young Lawyers Division
Liaison to LAMP Committee

The American Bar Association's Standing Committee on Legal Assistance for Military Personnel (LAMP) met at the United States Coast Guard Academy in New London, Connecticut on 2 and 3 December 1984. Committee members, advisors, and liaisons, and representatives from the Coast Guard Academy, the Coast Guard Chief Counsel's office, other military legal offices, and the Connecticut State Bar Association attended the meeting.

At the committee's public working session on 3 December, members of the Advisory Committee delivered reports on new developments in legal assistance. The Advisory Committee is made up of the senior legal assistance officers for each of the services and the Commandants of the Air Force Judge Advocate General's School; The Judge Advocate General's School, Army; and the Naval Justice School. The Air Force reported work on a computerized system to identify Reserve Component judge advocates by specialties and work toward providing private insurance coverage to service members for damage to government family housing. The Navy is rewriting its legal assistance regulation, expanding its paralegal program and preparing deskbooks on powers of attorney, adoptions and name changes. The Coast Guard reported on its word processing program, Volunteer Income Tax Assistance (VITA) program, and statistics which indicate an increase in the number of consumer-oriented cases. The Marine Corps announced publication of a bimonthly newsletter and designation of two more offices for the Expanded Legal Assistance Program (ELAP). The Army reported on its Reserve-Guard Judge Advocate Legal Assistance Advisory Committee, which utilizes Reserve Component judge advocates in each state to monitor developments in state law and keep its deskbooks up-to-date, provided statistics on its legal assistance program and furnished committee members copies of the *All-States Guides* prepared at TJAGSA. The liaison from the ABA's Board of Governors reported on items of general interest, and LAMP Committee members discussed several items carried over from previous meetings. These included Military Voting Assistance, Operation Standby, Professional Liability and ABA support packages.

The committee agreed that absentee ballots for service members should be made available at least forty-five days in advance of elections and that ballots should be counted if received within seven to ten days after elections. Service members stationed overseas encounter the most problems in this area. It was noted, though, that the Department of Justice secured temporary restraining orders in eight states to suspend early deadlines for receipt of absentee ballots. The concensus of the committee was to focus its efforts on state legislatures because the most difficult problems exist with respect to state elections.

"Operation Standby," which enrolls volunteer civilian attorneys to assist military legal assistance officers, has recently made headway in California and Arizona. Seven states presently have such programs, but the LAMP Committee's goal is to add two more states in fiscal year 1985 and three more in fiscal year 1986.

A videotape entitled "Cooperation is the Keynote," which outlines ABA services and resources available to legal assistance officers, has been prepared by the LAMP Committee and will soon be available. An "action kit" of audiotapes and sample documents is presently being compiled and will be made available to military attorneys. The Committee's *Legal Assistance* Newsletter will now be distributed quarterly to legal assistance offices; Volume 21 was scheduled to be printed in January 1985.

The committee voted on Legal Assistance Awards for offices and individuals, and discussed new criteria for awards so as to

recognize past service as well as future potential and to limit individual awards to service personnel and service civilian employees.

Under administrative business, the ABA Staff Liaison announced dues increases for 1985 but also announced that CLEs sponsored by the ABA will be made available to government attorneys at a reduced rate. The Committee Chairman announced that the committee's next meeting will be sponsored by the Navy in Hawaii from 6-12 March 1985. Future meetings will be hosted by the Marine Corps at Camp Pendleton in June 1985, and by the Army at either West Point or San Antonio in September 1985. The committee holds open sessions at each meeting and local judge advocates are encouraged to attend.

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

Consumer Complaint Arbitration/Dispute Resolution Panels

Among the more troublesome cases for legal assistance officers are those consumer complaints relating to appliances, furniture, or other products where the client appears to have a legitimate complaint, but the dollar amount involved does not justify court action or, for whatever reason, the client does not want to go to court. Often, the client expects the legal assistance officer to resolve the matter anyway.

There are forums, however, to which a client can be referred and can obtain action and, possibly, relief on the consumer complaint. Listed below are some of the forums which are available:

—The Major Appliance Consumer Action Panel (MACAP). MACAP is an independent, complaint mediation group. If the client has a complaint concerning a warranty or other problem relating to:

Clothes washers and dryers

Dehumidifiers

Food waste disposers

Freezers

Microwave ovens

Ranges and ovens

Room air conditioners

Trash compactors

Water heaters

MACAP will offer assistance on these major appliances for all major appliance makers (except Amana and Litton). MACAP requires that the consumer first contact the local dealer or the service agency authorized to fix the brand the consumer owns. If the consumer is still not satisfied, MACAP requires that the consumer contact the manufacturer or brand-name retailer of the appliance. The consumer can obtain this address and telephone number from the use and care booklet which came with the appliance. If the problem is still not resolved to the consumer's satisfaction, assistance may be requested from MACAP.

When contacting MACAP on behalf of a legal assistance client, the attorney should provide the consumer's name, address, and a daytime telephone number where the consumer may be contacted; the type of appliance, brand, model and serial numbers; the purchase date and price of the appliance; the name, address, and telephone number of the dealer or repair service; copies of all letters that the consumer has written or received about the complaint; copies of all service receipts; and a clear description of the problem and what the client thinks is a reasonable solution.

MACAP is a panel composed of nine independent consumer experts, none of whom are from

the appliance industry. The panel, however, is sponsored by the Association of Home Appliance Manufacturers, the Gas Appliance Manufacturers Association, and the National Retail Merchants Association. Panel members attempt to informally resolve the complaint through non-binding arbitration. This means that decisions of the panel are not binding on either the appliance manufacturer, dealer or the consumer. The address and telephone number are MACAP, 20 North Wacker Drive, Chicago, IL 60606, (312) 984-5858

—The Furniture Industry Consumer Advisory Panel (FICAP). FICAP is a dispute resolution panel sponsored by members of the Southern Furniture Manufacturer's Association, whose members account for approximately half of the furniture sales in the U.S. It handles consumer complaints on furniture less than one-year-old and is comprised of six members, three consumer representatives and three industry representatives. Like MACAP, its decisions are nonbinding on either the industry or the consumer. The address and telephone number for FICAP are FICAP, P.O. Box 951, High Point, NC 27261, (919) 889-1905

—The Household Goods Dispute Settlement Program (HGDSP). Service members are generally compensated for losses incurred as a result of permanent change of station moves through the Army claims program. In those circumstances where the claim is not covered or where the consumer does not receive full compensation for the loss because of limitations within the Army claims procedures, it may be possible to obtain relief from HGDSP. The major national van lines participate in HGDSP, which handles claims for damage or loss of goods shipped interstate. The panel is composed of an arbitrator or a panel chosen by the American Arbitration Association. The particular van line involved has to agree to arbitration before the HGDSP can be used. The arbitration is based entirely on written documents; there are no hearings. The decision of the arbitrator or the arbitration panel, however, is binding on both the consumer and the mover. The address and telephone number are HGDSP, 400 Army-Navy Drive, Arlington, VA 22202, (703) 521-1111

—The Better Business Bureau (BBB) National Consumer Arbitration Program. There are more than 17,000 local retail and service businesses which participate in this program. The BBB handles any complaint arising out of a disagreement with a marketplace transaction. What is unique about the BBB Consumer Arbitration Program, and what makes it useful for legal assistance officers, is that even in localities where the local retail or service business is not one of the 17,000 precommitted participants, the BBB will try to get the business to arbitrate. The arbitration is conducted by one arbitrator chosen by BBB. Consumers should contact their local BBB or call (800) 228-6605 (within the U.S.).

Uniformed Services Former Spouses' Protection Act Amendments

Significant changes to the Uniformed Services Former Spouses' Protection Act, enacted as part of the Department of Defense Authorization Act of 1985, took effect on 1 January 1985. These changes have already generated many inquiries to legal assistance officers and military identification card issuing offices.

The amendments are primarily in three areas: changes to clarify circumstances under which the finance centers of the various uniformed services are authorized to make direct payments for alimony and child support, changes to amend the provisions of the Survivor Benefit Plan designating a former spouse as an SBP beneficiary and amendments which broaden the categories of former spouses eligible for identification cards for commissary, post exchange, and medical benefits.

The USFSPA amendments are found in Title VI, Part E, §§ 641-645 of the Authorization Act. The amendments clarified the authority of the finance centers of the uniformed services to make payments from retired or retainer pay pursuant to court orders for alimony, child support, and awards of retired pay as separate property. As originally enacted, the USFSPA permitted a former spouse to apply to the service finance center for a direct payment if a court awarded retired pay as alimony or child support, and in certain cases, if the retired pay

was awarded as separate property of the former spouse. The original statute, however, required that the court order contain express language that the alimony, child support, or award as separate property be made from retired pay. The USFSPA amendments removed this requirement for alimony and child support direct payments.

As of 1 January 1985, the finance centers are authorized to make direct payments for alimony and child support from retired pay where the court order does *not* specifically refer to retired pay. The limitation for property awards remains, however. Thus, finance centers will not honor the application of a former spouse for a direct payment where the court awarded the former spouse a portion of the military retiree's pension but the court order does not expressly specify that the payments be made from retired pay. This amendment applies only to court orders served on the finance centers after 1 January 1985.

The amendments also eliminated a requirement in the original USFSPA that the former spouse provide the finance center with the retiree's social security number. Now, the former spouse is to provide the social security number "if possible."

The amendments also clarify provisions relating to the retiree's election of the former spouse as a beneficiary of the Survivor Benefit Plan. As originally enacted, a retiree could name his or her former spouse as the SBP beneficiary at the time he or she became eligible to opt in or out of the Survivor Benefit Plan. This election was revocable by the retiree up until the time the election was incorporated in or ratified or approved by a court order. At that point, the designation became irrevocable.

There was, however, no statutory authority for finance centers to initiate an SBP designation on behalf of a former spouse when the designation had become irrevocable but the retiree failed or refused to make such an election, even though the retiree's voluntary written agreement had been incorporated into a court decree. The amendments now permit a former spouse in this situation to request that the finance center make such a designation on his or her behalf. If the finance center receives such a request and a copy of a court order that incorporates, ratifies or approves a voluntary written agreement by the retiree to name the former spouse as SBP beneficiary, the finance center is authorized to make such a designation on behalf of the retiree.

Finally, the amendments change the eligibility requirements for former spouses to medical, commissary and post exchange privileges. As originally enacted, the USFSPA granted medical, commissary, and post exchange privileges to unremarried former spouses who were married to service members or retirees for twenty years, during which time the service member or retiree served twenty or more years of service creditable toward retirement. The years of marriage must overlap with the years of service, creating what is referred to as a "20/20/20 test". Unfortunately for many long-term former spouses, only those with divorce decrees final after 1 February 1983, the effective date of the USFSPA, qualified for medical, commissary, and post exchange privileges. One provision of the amendments removes that 1 February 1983 limitation. Now, former spouses who meet the "20/20/20" test, regardless of the date of the divorce decree, are eligible for commissary, exchange, and medical benefits. To qualify for medical benefits, however, the requirement remains that the former spouse not be covered by another medical plan.

A new, short-term category of former spouses also eligible for medical benefits was created by the amendments. Until 1 April 1985, former spouses who were married to service members or retirees for twenty years, during which time the service member or retiree served twenty or more years creditable toward retirement, will be eligible for medical benefits. This new category, however, requires only a fifteen-year overlap between the marriage and the service, creating a new test referred to as the "20/20/15 test". Former spouses who fall within this category, however, are eligible only for medical care, not commissary and exchange privileges. There is no limitation tying eligibility to the date of the final decree. Thus, former spouses who meet the "20/20/15 test," regardless of the

date of the final decree, will be eligible for medical benefits as long as the decree is final before 1 April 1985. Like former spouses who meet the "20/20/20 test," the "20/20/15" former spouses must be unremarried and not be covered by another medical plan to qualify for medical benefits.

Finally, former spouses whose decrees are final after 1 April 1985 and who meet the "20/20/15" test will be entitled to two years of transitional military medical benefits, after which they will have a right to convert to a private health insurance plan. Former spouses who fall in this category, however, are also subject to the remarriage and other medical coverage restrictions. Former spouses who do not meet the "20/20/15" test will be provided the option of electing coverage in the conversion plan for private health insurance. Congress left it up to the courts and the parties to resolve whether the former spouse or the retiree will be responsible for paying the costs of the private insurance.

Community and Family Support Center Established

Army legal assistance officers should be aware that a U.S. Army Community and Family Support Center has been established at MILPERCEN and will handle functions formerly handled by the Personal Affairs Branch, MILPERCEN. Many of these functions relate to legal assistance:

Inquiries on nonsupport of family members.

Allegations of paternity.

Allegations of personal indebtedness.

CHAMPUS claims.

Requests for ID cards.

Applications for authorization to marry outside the United States which require HQDA action.

The Center will also be responsible for updating AR 600-15, Indebtedness of Military Personnel; AR 600-240, Marriage in Overseas Commands; AR 608-61, Application for Authorization to Marry Outside the United States; and AR 608-99, Support of Dependents, Paternity Claims, and Related Adoption Proceedings.

Legal assistance officers who handle nonsupport complaints frequently write to the commander of the individual against whom the claim of nonsupport is made. In many cases, the commander's action pursuant to AR 608-99, para. 2-6, resolves the matter. In appropriate circumstances, however, legal assistance officers should be aware that they, or their clients, may write directly to the Center and request assistance.

In the past, such requests for assistance were to be addressed to DAPC-EPA-P (for nonsupport cases relating to enlisted personnel) or DAPC-OPP-M (for nonsupport cases relating to officer personnel). Now, any nonsupport complaints, allegations of paternity, questions concerning applications to marry overseas, or indebtedness complaints should be addressed to Commander, USACFSC, ATTN: DACF-IS-PA, 2461 Eisenhower Avenue, Alexandria, VA 22331-0522.

Additionally, the following legal assistance related functions will be transferred to the Special Actions Branch, Enlisted Personnel Management Division (EPMD), MILPERCEN (DAPC-EPA-S):

Requests for remission of indebtedness for enlisted personnel pursuant to AR 600-4.

Requests for waiver of one month's advance pay of enlisted personnel whose dependents are evacuated during an emergency.

Inquiries on the Army's mortgage insurance program under AR 608-8.

Legal assistance officers assisting clients with cases in these areas, such as assisting a client draft a request for remission of indebtedness, should follow the procedures and forwarding requirements of the applicable regulation. However, inquiries or replies on pending cases should be sent to Commander, MILPERCEN, ATTN: DAPC-EPA-S, 2461 Eisenhower Avenue, Alexandria, VA 22331-0400

Review Board To Be Established

The Army will soon establish a Special Review Board for the purpose of standardizing procedures for both officer and enlisted evaluation report appeals. Both enlisted and officer special review actions will be the responsibility of one overall president to ensure uniformity of purpose and control.

This board is of interest to legal assistance officers given the increased emphasis on OER/EER appeals. Legal assistance for OER/EER appeals was the subject of TJAG Policy Letter 84-2, 2 August 1984. The policy letter requires each staff judge advocate to ensure that military members who request advice about the preparation or submission of OER/EER appeals receive advice from judge advocates or civilian attorneys of the Judge Advocate General's Corps.

Both boards were scheduled to become operational by the end of 1984. The boards will process and adjudicate appeals submitted by members of the Total Army and will include in their membership representatives for the Active and Reserve components.

The boards will be under the direct operational control of the Director of Military Personnel Management, Office of the Deputy Chief of Staff for Personnel, Department of the Army. In addition to the establishment of the new boards, Army Regulations 623-105 (Officer) and 623-205 (Enlisted) will standardize appeal procedures for both officers and enlisted soldiers.

Debt Collection From Service Members and Army Employees

The Department of Defense has published a proposed rule that will implement the Debt Collection Act of 1982. 49 Fed. Reg. 35,148 (1984). Legal assistance officers may begin seeing clients in increasing numbers whose pay accounts may be subject to recoupment action under this Act.

The Act permits federal agencies to collect debts owed the government from the pay of service members and civilian employees. Most of the cases will likely arise in areas such as Veteran's Administration school benefits and Department of Education school loans on which a service member or civilian employee has defaulted. The Act could also apply to collections under AR 735-11, travel or per diem overpayments, and collections from the pay of service members for shipments of household good which exceed weight limitations.

Legal assistance officers should consider the application of this Act when counselling clients in these areas.

Deductions for Personal-Use Equipment

The Tax Reform Act of 1984 significantly curtailed deductions for personal-use equipment. The business tax break for equipment such as automobiles, boats, airplanes, and home computers is restricted to items which are used for business purposes more than fifty percent of the time. Additionally, employees who desire to take the deduction must be required by their employer to have the equipment. Having the equipment for the convenience of the employee will not qualify. Taxpayers who intended to take the deductions must keep a detailed log of business use of the equipment. These changes make it even more difficult to justify deductions and investment credits for home computers.

Legal Assistance Materials Distributed

Legal assistance offices on the Legal Assistance Branch, TJAGSA, worldwide mailing list should have received the following materials in December or early January:

(1) *The All-States Guide to State Notarial Laws.* This is the newest of the *All-States Guides* published by TJAGSA. It is designed to complement a joint service regulation, AR 600-11/AFR 110-6, which is currently undergoing revision by the Air Force and will be published in early 1985.

(2) A handbook on child support enforcement from the US Department of Health and Human Services Office of Child Support Enforcement. Although the publication is designed for nonattorneys who have questions about child support, it has a question and answer format which makes it ideal as a source for office handouts for the legal assistance waiting room or as the basis for articles in an installation newspaper.

(3) LAMP Newsletter Number 20. The LAMP Committee (the American Bar Association's Standing Committee on Legal Assistance to Military Personnel) sends copies of its quarterly newsletter to TJAGSA for distribution to the field.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Reserve Component Technical (On-Site) Training

The following schedule sets forth the training sites, dates, subjects, instructors, and local action officers for the Reserve Component Technical (On-Site) Training Program for Academic Year (AY) 1985. The Judge Advocate General has directed that all Reserve Component judge advocates assigned to The Judge Advocate General Service Organizations (JAGSO) or to judge advocate sections of USAR and ARNG troop program units attend the training in their geographical area (AR 135-316). All other judge advocates (Active, Reserve, National Guard, and other services) are strongly encouraged to attend the training sessions in their areas. The On-Site Program features instructors from The Judge Advocate General's School and has been approved for continuing legal education credit in several states. Some On-Sites are co-sponsored by other organizations, such as the Federal Bar Association, and include instruction by local attorneys. The civilian bar is invited and encouraged to attend On-Site training.

Action officers are required to coordinate with all Reserve Component units in their geographical area with assigned judge advocates. Invitations will be issued to staff judge advocates of nearby active armed forces installations. Action officers will notify all members of the Individual Ready Reserve (IRR) that the training will occur in their geographical area. Members of the IRR earn retirement point credit for attendance IAW AR 140-185. These actions provide maximum opportunity for interested JAGC officers to take advantage of this training.

Whenever possible, action officers will arrange enlisted legal clerk and court reporter training to run concurrently with On-Site training. In past years, enlisted training programs have featured Reserve Component JAGC officers and non-commissioned officers as instructors, as well as active duty staff judge advocates and instructors from the Army legal clerk's school at Fort Benjamin Harrison.

JAGSO detachment commanders will insure that unit training schedules reflect the scheduled technical training. SJAs of other Reserve Component troop program units should insure that the unit training schedule reflects judge advocate attendance at technical training. Attendance may be scheduled as RST (regularly scheduled training), as ET (equivalent training), or on manday spaces. It is recognized that many units providing mutual support to active armed forces installations may have to notify the installation SJA that mutual support will not be provided on the day(s) of instruction.

Questions concerning the On-Site instructional program should be directed to the appropriate action officer at the local level. Problems which cannot be resolved by the action officer or the unit commander should be directed to Captain Thomas W. McShane, Chief, Unit Training and Liaison Office, Reserve Affairs Department, The Judge Advocate General's School, U. S. Army, Charlottesville, Virginia 22901 (telephone (804) 293-6121; Autovon 274-7110, Extension 293-6121; or FTS 938-1301).

Reserve Component Technical (On-Site) Training Program, AY 85

Date	City, Host Unit and Training Site	Subjects/Instructors		Action Officer
12, 13 Jan 85	Los Angeles, CA 78th MLC Marina Del Rey/ Marriott Marina Del Rey, CA	Criminal law Admin & Civil Law	MAJ Boucher MAJ Hemingway	LTC Charles Jeglikowski 4256 Ellenita Ave Tarzana, CA 91356 (213) 688-4636 FTS 798-4636
26, 27 Jan 85	Orlando, FL 81st ARCOM Court of Flags Ramada Inn Orlando, FL	International Law Contract Law	LTC Taylor MAJ Smith	COL James E. Baker 5260 Redfield Court Dunwoody, GA 30338 (404) 221-6455 FTS 242-6455
29, 30 Jan 85	San Juan, PR 7581st USAG Fort Buchanan, PR	International Law Contract Law	LTC Taylor MAJ Smith	MAJ Nestor D. Ramirez Orinoco 1690 El Cerezal Rio Piedras, PR 00926 (809) 722-5019
2, 3 Feb 85	Nashville, TN 121st ARCOM Vanderbilt University School of Law Nashville, TN	Admin & Civil Law Criminal Law	MAJ St. Amand MAJ Clevenger	MAJ Douglas A. Brace 23d Floor, L&C Tower Nashville, TN 37219 (615) 256-9999
9, 10 Feb 85	Seattle, WA 124th ARCOM University of Washington School of Law Seattle, WA	Admin & Civil Law Criminal Law	MAJ Jones MAJ Finnegan	LTC Charles A. Kimbrough Karr, Tuttle, Koch, Campbell, Mawer & Morrow, P.S. 1111 Third Av., Suite 2500 Seattle, WA 98101 (206) 223-1313
23, 24 Feb 85	Denver, CO 96th ARCOM Quade Hall Fitzsimons AMC Denver, CO	International Law Contract Law	MAJ Romig CPT Post	MAJ Robert B. Warren 105 E. Vermijo, Ste 600 Colorado Springs, CO 80903 (303) 578-1152
2, 3 Mar 85	Columbia, SC 120th ARCOM University of South Carolina School of Law Columbia, SC	Admin & Civil Law Criminal Law	MAJ Wagner MAJ Hahn	MAJ Robert S. Carr P.O. Box 835 Charleston, SC 29402 (803) 724-4523 FTS 677-4523
9, 10 Mar 85	Kansas City, MO 89th ARCOM Marriott Hotel KCI Airport Kansas City, MO	Admin & Civil Law Criminal Law Contract Law	MAJ L. Kennerly MAJ Boucher MAJ Cornelius	COL David W. Kolenda 8990 W. Dodge Rd., Ste 335 Omaha, NE 68114 (402) 393-3227
16, 17 Mar 85	San Francisco, CA 5th MLC HQ, 6th US Army Presidio of San Francisco, CA	Criminal Law Admin & Civil Law	LTC Gordon MAJ Lederer	COL Joseph W. Cotchett 322 West Bellevue Avenue San Mateo, CA 94402 (415) 342-9000
19, 20 Mar 85	Honolulu, HI IX Corps (AUG) Bruyeres Quadrangle Ft. DeRussy, HI	Criminal Law Admin & Civil Law	LTC Gordon MAJ Lederer	MAJ Frank Yap HQ, IX Corps (AUG) 302 Maluhia Road Ft DeRussy, HI 96815 (808) 521-6927

Date	City, Host Unit and Training Site	Subjects/Instructors		Action Officer
23 Mar 85	St. Louis, MO 102d ARCOM Metropolitan Bar Association 7777 Bonhomme 23d Floor Clayton, MO	International Law Admin & Civil Law	MAJ McAtamney MAJ Mulliken	LTC Robert L. Hartzog 211 South Central Clayton, MO 63105 (314) 863-2700
23, 24 Mar 85	Washington, D.C. 97th ARCOM HQ, First US Army Ft. Meade, MD	International Law Contract Law	LTC Taylor MAJ D. Kennerly	MAJ Robert Lowell 4028 Wildwood Way Ellicott City, MD 21043 (301) 962-7711
13 Apr 85	Pittsburgh, PA 99th ARCOM Malcolm Hay USAR Center 950 Saw Mill Run Blvd. Pittsburgh, PA	Admin & Civil Law International Law	MAJ Henry MAJ Romig	CPT Ernest B. Orsatti 219 Fort Pitt Blvd. Pittsburgh, PA 15222 (412) 281-3850
13, 14 Apr 85	New Orleans, LA LA ARNG Site TBD	Contract Law Criminal Law	MAJ Smith MAJ Gaydos	LTC W. Arthur Abercrombie, Jr. Taylor, Porter, Brooks & Phillips P.O. Box 2471 Baton Rouge, LA 70821 (504) 387-3221
27, 28 Apr 85	Chicago, IL 86th ARCOM SJA Conference Room Ft. Sheridan, IL	International Law Contract Law	MAJ McAtamney MAJ D. Kennerly	LTC William Raysa 7402 West Roosevelt Road Forest Park, IL 60130 (312) 386-7273
11, 12 May 85	Columbus, OH 83d ARCOM Defense Construction Supply Center (DCSC) Columbus, OH	Criminal Law Admin & Civil Law	MAJ Peluso MAJ Rosen	LTC Dennis A. Schulze 9th JAG Detachment (MLC) Box 16515, DCSC Columbus, OH 43216 (614) 238-3702

Enlisted Update

Sergeant Major Walt Cybart

Maintenance of Authorized Legal Clerk Strength

The following was submitted by SGM(Ret) James H. Treat, Fort Leonard Wood, Missouri.

The legal clerk strength of an organization totally depends upon the personnel replacement system which, in turn, is based upon SIDPERS. Ideally, the personnel replacement system works to provide a replacement at about the same time as a projected loss. Frequently, a replacement does not arrive because MILPERCEN has been given faulty or slow SIDPERS update information.

SIDPERS update information is keyed into MILPERCEN's computer by the local adjutant general. However, that update information is not known to the MILPERCEN liaison NCO until he receives a printout from MILPERCEN. When he calls the chief legal NCO of the organization concerned, some of the following problems may surface:

a. A soldier who has departed may still be carried against the organizational strength.

b. A soldier identified for assignment from or to an overseas unit may still be projected for the assignment, even though the soldier has extended the overseas tour or has been deleted or deferred from the new assignment.

c. A basic trainee who has enlisted for 71D school (or a reservist or NG soldier who has the MOS or will be going to the 71D school after basic training) may erroneously be carried against the organization's 71D end-strength. (This usually occurs because SIDPERS has reported the skill level to be "10" rather than the trainee skill level "00".)

d. A re-enlistee may be projected for assignment after 71D school but fail to complete the course.

e. MILPERCEN may erroneously key MOS "71D" into the computer for a soldier who is not a 71D.

f. ETS/DEROS dates and grade may be erroneous.

g. A 71D who is on special detail as drill instructor or on recruiting duty may not have been placed into the MOS escrow account.

When an assigned soldier is on lengthy hospitalization status or is pending charges, elimination, or reclassification, that soldier is not a productive member of the organization but continues to be counted against end-strength until he or she departs or is reclassified. This person will be part of the perceived shortage of personnel in the eyes of the organization concerned.

There is no ideal solution which will resolve all the potential problems; however, the following ideas are presented for consideration:

a. Based on DA-established assignment priorities, the percentage of authorized fill for given organizations/installations ranges from slightly over 100% to less than 90%. The chief legal NCO of the organization should learn the percentage factor that applies to that organization and work diligently to maintain that percentage of assigned personnel.

b. Frequent and accurate information-sharing between SFC Scarborough (SGM Giddens in USAREUR or SGM Underwood in Korea) and the chief legal NCO is the primary key to resolving personnel imbalances at an installation/organization (and Army-wide for that matter). It is essential that chief legal NCOs be in frequent contact with our MILPERCEN liaison NCO (or legal clerk assignment manager for USAREUR or Korea) for comparative strength analysis. It is also essential that the chief legal NCOs work closely with local AG personnel management to insure that the legal clerks are properly assigned/reassigned, that the SIDPERS data is accurate and timely submitted, and that

valid and timely requisitions for personnel are submitted.

c. To further aid the field in reconciling personnel strength, SFC Scarborough has begun a quarterly report to the field that shows the MILPERCEN tote-sheet of personnel assigned to a given installation/organization. It is essential that the chief legal NCO examine this report and reconcile any discrepancies in the report with SFC Scarborough. This will enable the MILPERCEN liaison NCO to help all of us achieve a balanced strength picture.

CLE News

1. Mandatory Continuing Legal Education Requirement

Fourteen states currently have a mandatory continuing legal education (MCLE) requirement. The most recent state to adopt MCLE is Kentucky, whose program was effective on 1 July 1984. In addition, Vermont has adopted MCLE to be effective 1 June 1985.

In these fourteen MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7-16 (October 1984) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by thirteen of these MCLE jurisdictions. Approved sponsor status has been applied for in Montana.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date:

State	Local Official	Program Description
Alabama	MCLE Commission Alabama State Bar P.O. Box 671 Montgomery, AL 36101 (205) 269-1515	—Active attorneys must complete 12 hours of approved continuing legal education per year. Active duty military attorneys are exempt but must declare exemption annually. —Reporting date: on or before 31 December annually
Colorado	Executive Director Colorado Supreme Court Board of Continuing Legal and Judicial Education. 190 East 9th Avenue Suite 410 Denver, CO 80203 (303) 832-3693	—Active attorneys must complete 45 units of approved continuing legal education (including 2 units of legal ethics) every three years. Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within three years. —Reporting date: 31 January annually
Georgia	Executive Director State Bar of Georgia 85 Peachtree Street Atlanta, GA 30303 (404) 522-6255	—Active attorneys must complete 12 hours of approved continuing legal education per year. Every three years each attorney must complete six hours of legal ethics. —Reporting date: 31 January annually

State	Local Official	Program Description
Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342-8959	—Active attorneys must complete 30 hours of approved continuing legal education every three years. —Reporting date: 1 March every third anniversary following admission to practice.
Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 281-3718	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 March annually.
Kentucky	Continuing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, Kentucky 40601 (502) 564-3793	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 30 days following completion of course.
Minnesota	Executive Secretary Minnesota State Board of Continuing Legal Education 875 Summit Ave St. Paul, MN 55105 (612) 227-5430	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 March every third year.
Montana	Director Montana Board of Continuing Legal Education P.O. Box 4669 Helena, MT 59604 (406) 442-7660	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 April annually.
Nevada	Executive Director Board of Continuing Legal Education State of Nevada P.O. Box 12446 Reno, NV 89510 (702) 826-0273	—Active attorneys must complete 10 hours of approved continuing legal education each year. —Reporting date: 15 January annually.
North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58502 (701) 255-1404	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 February submitted in three year intervals.
South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799-5578	—Active attorneys must complete 12 hours of approved continuing legal education per year. Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 10 January annually.

State	Local Official	Program Description
Washington	Director of Continuing Legal Education Washington State Bar Association 505 Madison Seattle, WA 98104 (206) 622-6021	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 31 January annually.
Wisconsin	Director, Board of Attorneys Professional Competence Room 403 110E Main Street Madison, WI 53703 (608) 266-9760	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.
Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82001 (307) 632-9061	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

2. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOM. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132, if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

3. TJAGSA CLE Course Schedule

January 21-March 29: 106th Basic Course (5-27-C20).

February 4-8: 77th Senior Officer Legal Orientation Course (5F-F1).

February 11-15: 5th Commercial Activities Program Course (5F-F16).

February 25-March 8: 102nd Contract Attorneys Course (5F-F10).

March 4-8: 29th Law of War Workshop (5F-F42).

March 11-15: 9th Administrative Law for Military Installations (5F-F24).

March 11-13: 3d Advanced Law of War Seminar (5F-F45).

March 18-22: 1st Administration and Law for Legal Clerks (512-71D/20/30).

March 25-29: 16th Legal Assistance Course (5F-F23).

April 2-5: JAG USAR Workshop.

April 8-12: 4th Contract Claims, Litigation, & Remedies Course (5F-F13).

April 8-June 14: 107th Basic Course (5-27-C20).

April 15-19: 78th Senior Officer Legal Orientation Course (5F-F1).

April 22-26: 15th Staff Judge Advocate Course (5F-F52).

April 29-May 10: 103d Contract Attorneys Course (5F-F10).

May 6-10: 2nd Judge Advocate Operations Overseas (5F-F46).

May 13-17: 27th Federal Labor Relations Course (5F-F22).

May 20-24: 20th Fiscal Law Course (5F-F12).

May 28-June 14: 28th Military Judge Course (5F-F33).

June 3-7: 79th Senior Officer Legal Orientation Course (5F-F1).

June 11-14: Chief Legal Clerks Workshop (512-71D/71E/40/50).

June 17-28: JATT.

June 17-28: JAOAC: Phase VI.

July 8-12: 14th Law Office Management Course (7A-713A).

July 15-17: Professional Recruiting Training Seminar.

July 15-19: 30th Law of War Workshop (5F-F42).

July 22-26: U.S. Army Claims Service Training Seminar.

July 29-August 9: 104th Contract Attorneys Course (5F-F10).

August 5-May 21 1986: 34th Graduate Course (5-27-C22).

August 19-23: 9th Criminal Law New Developments Course (5F-F35).

August 26-30: 80th Senior Officer Legal Orientation Course (5F-F1).

4. Civilian Sponsored CLE Courses

April 1985

4: IICLE, Federal Rules of Evidence, Springfield, IL.

5: IICLE, Federal Rules of Evidence, Chicago, IL.

5: ABICLE, Southeastern Trial Institute, Birmingham, AL.

6: CCLE, Appellate (Video), Cortez, CO.

9-13: NCDA, Prosecution of Violent Crime, Cambridge, MA.

11: IICLE, New Developments in Creditors' Rights & Bankruptcy, Chicago, IL.

11-12: PLI, Negotiating, San Francisco, CA.

11-12: PLI, Negotiating, Los Angeles, CA.

11-13: ABICLE, Southeastern Corporate Law, Point Clear, AL.

12: TBA, Changes in Civil Litigation, Procedure & Discovery, Dyersburg, TN.

12: IICLE, Marketing for Lawyers & Law Firms, Chicago, IL.

12: ARBA, Workers' Compensation Institute, Little Rock, AR.

12-13: KCLE, Environmental & Natural Resources Law, Lexington, KY.

14-18: NCDA, Forensic Evidence, Denver, CO.

15-18: GCP, Government Contract Claims, Washington, DC.

18: IICLE, Jury Selection, Body Language & Visual Trial, Springfield, IL.

18-19: PLI, Computer Warranties, New York, NY.

18-19: PLI, Creative Real Estate, San Francisco, CA.

18-20: ALIABA, Business Reorganizations Under the Bankruptcy Code, Boston, MA.

19: TBA, Changes in Civil Litigation, Procedure & Discovery, Clarksville, TN.

19: IICLE, Jury Selection, Body Language & Visual Trial, Chicago, IL.

19: ABICLE, Representing Small Businesses, Birmingham, AL.

19-20: ARBA, Labor Law Institute, DeGray, Little Rock, AR.

19-20: KCLE, Domestic Relations, Lexington, KY.

22-23: ABA, National Legal Malpractice Institute, New Orleans, LA.

24: IICLE, Securities Law Update '85, Chicago, IL.

25: IICLE, Securities Law Update '85, Springfield, IL.

25-26: PLI, Advanced Will Drafting, New York, NY.

25-26: PLI, Hazardous Waste Litigation, New York, NY.

25-26: PLI, Pre-Indictment Advocacy, Chicago, IL.

26: ARBA, Tax Awareness Institute, Little Rock, AR.

26: TBA, Changes in Civil Litigation, Procedure & Discovery, Gatlinburg, TN.

26: IICLE, Securities Law Update '85, Chicago, IL.

28-5/1: NCDA, Representing State & Local Governments, Incline Village, NV.

28-5/2: NCDA, Trial Strategy and Techniques, Orlando, FL.

29-30: PLI, Liability of CPAs Under Securities Laws, New York, NY.

29-30: IICLE, Acquisitions & Tender Offers, Chicago, IL.

For further information on civilian courses, please contact the institution offering the course, as listed below:

AAA: American Abritration Association, 140

West 51st Street, New York, NY 10020. (212) 383-6516.

AAAJE: American Academy of Judicial Education, Suite 903, 2025 Eye Street, N.W., Washington, DC 20006. (202) 775-0083.

ABA: American Bar Association, National Institutes, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6215.

ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486.

AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800)CLE-NEWS; (215) 243-1630.

ARBA: Arkansas Bar Association, 400 West Markham Street, Little Rock, AR 77201. (501) 371-2024.

ARKCLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201.

ASLM: American Society of Law and Medicine, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. Washington, DC 20007. (202) 965-3500.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, DC 20037. (800) 424-9890; (202) 452-4420.

CCEB: California Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415) 642-0223; (213) 825-5301.

CCLE: Continuing Legal Education in Colorado, Inc., University of Denver Law Center, 200 W. 14th Avenue, Denver, CO 80204.

CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706. (608) 262-3833.

DLS: Delaware Law School, Widener College, P.O. Box 7474, Concord Pike, Wilmington, DE 19803.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006. (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, DC 20003.

FLB: The Florida Bar, Tallahassee, FL 32301.

FPI: Federal Publications, Inc., 1725 K Street, N.W., Washington, DC 20006. (202) 337-7000.

GCP: Government Contracts Program, The George Washington University, Academic Center, T412, 801 Twenty-second Street, N.W., Washington, D.C. 20052. (202) 676-6815.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GTULC: Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, DC 20001.

HICLE: Hawaii Institute for Continuing Legal Education, University of Hawaii School of Law, 1400 Lower Campus Road, Honolulu, HI 96822.

HLS: Program of Instruction for Lawyers, Harvard Law School, Cambridge, MA 02138.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

IICLE: Illinois Institute for Continuing Legal Education, Chicago Conference Center, 29 South LaSalle Street, Suite 250, Chicago, IL 60603. (217) 787-2080.

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 235 South 17th Street, Philadelphia, PA 19103.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506. (606) 257-2922.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800) 421-5722; (504) 566-1600.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803. (504) 388-5837.

MCLNEL: Massachusetts Continuing Legal Education, Inc., 44 School Street, Boston, MA 02109.

MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906.

MICLE: Institute of Continuing Legal Education, University of Michigan, Hutchins Hall, Ann Arbor, MI 48109.

MNCLE: Continuing Legal Education, A Division of the Minnesota State Bar Association, 40 North Milton, St. Paul, MN 55104.

MOB: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102. (314) 635-4128.

NATCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. (713) 749-1571.

NCJFCJ: National Council of Juvenile and Family Court Judges, University of Nevada, P.O. Box 8979, Reno, NV 89507-8978.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 American Charter Center, 206 South 13th Street, Lincoln, NB 68508.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 328-4815 ext. 225; (800) 752-4249 ext. 225; (612) 644-0323.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NJCLE: Institute for Continuing Legal Education, 15 Washington Place, Suite 1400, Newark, NJ 07102.

NKUCCL: Northern Kentucky University, Chase College of Law, 1401 Dixie Highway, Covington, KY 41011. (606) 527-5444.

NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, DC 20006. (202) 452-0620.

NMCLE: State Bar of New Mexico, Continuing Legal Education, P.O. Box 25883, Albuquerque, NM 87125. (505) 842-6132.

NWU: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518) 463-3200.

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 10038.

NYULS: New York University, School of Law, 40 Washington Sq. S., Room 321, New York, NY 10012. (212) 598-2756.

NYUSCE: New York University, School of Continuing Education, Continuing Education in Law and Taxation, 11 West 42nd Street, New York, NY 10036. (212) 790-1320.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201.

PATLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

PBI: Pennsylvania Bar Institute, P.O. Box 1027, 104 South Street, Harrisburg, PA 17108. (800) 932-4637; (717) 233-5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700 ext. 271.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711. (512) 475-6842.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: The Southwestern Legal Foundation, P.O. Box 707, Richardson, TX 75080. (214) 690-2377.

SMU: Continuing Legal Education, School of Law, Southern Methodist University, Dallas, TX 75275.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street, N.W., Washington, DC 20036, (202) 337-7000.

TUCLE: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118.

UDCL: University of Denver College of Law, Seminar Division Office, Fifth Floor, 1120 20th Street, N.W., Washington, DC 20036, (202) 237-7000 and University of Denver, Program of Advanced Professional Development, College of Law, 200 West Fourteenth Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004.

UMCC: University of Miami Conference Center, School of Continuing Studies, 400 S.E. Second Avenue, Miami, FL 33131. (305) 372-0140.

UMCCLE: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MO 65211.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816) 276-1648.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.

UTCLE: Utah State Bar, Continuing Legal Education, 425 East First South, Salt Lake City, UT 84111.

VACLE: Joint Committee of Continuing Legal Education of the Virginia State Bar and the Virginia Bar Association, School of Law, University of Virginia, Charlottesville, VA 22901. (804) 924-3416.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, 505 Madison Street, Seattle, WA 98104.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. Other government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD B086941	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-83-7 (150 pgs).
AD B086940	Criminal Law, Procedure, Trial/ JAGS-ADC-83-8 (100 pgs).
AD B086939	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-9 (80 pgs).
AD B086938	Criminal Law, Crimes & Defenses/JAGS-ADC-83-10 (180 pgs).

AD B086937 Criminal Law, Evidence/JAGS-ADC-83-11 (90 pgs).
AD B086936 Criminal Law, Constitutional Evidence/JAGS-ADC-83-12 (200 pgs).
AD B086935 Criminal Law, Index/JAGS-ADC-83-13 (75 pgs).
AD B078119 Contract Law, Contract Law Deskbook/JAGS-ADK-83-2 (360 pgs).
AD B078095 Fiscal Law Deskbook/JAGS-ADK-83-1 (230 pgs).
AD B079015 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1 (266 pgs).
AD B086999 Operational Law Handbook/JAGS-DD-84-1 (55 pgs).
AD B077739 All States Consumer Law Guide/JAGS-ADA-83-1 (379 pgs).
AD B079729 LAO Federal Income Tax Supplement/JAGS-ADA-84-2 (188 pgs).
AD B077738 All States Will Guide/JAGS-ADA-83-2 (202 pgs).
AD B080900 All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
AD B087746 Law of Military Installations (268 pgs).
AD B087774 Government Information Practices (301 pgs).

Those ordering publications are reminded that they are for government use only.

3. Regulations & Pamphlets

Number	Title	Change	Date
AR 55-46	Transportation and Travel—Travel of Dependents and Accompanied Military and Civilian Personnel To, From, or between Overseas Areas.	I05	21 Nov 84
AR 340-21-1	The Army Privacy Program—Systems Notices & Exemption Rules for Office Housekeeping Functions (S/S AR 340-21-1, 1 Apr 83).		15 Sep 84
AR 350-30	Code of Conduct/Survival, Evasion, Resistance and Escape (SERE) Training (S/S AR 350-30, 15 Mar 84 and AR 350-225, 15 Feb 84.		10 Dec 84
AR 350-225	(S/S by AR 350-30, 10 Dec 84)		
AR 735-17	Accounting for Library Books		19 Nov 84
AR 635-5	Personnel Separations	I01	21 Nov 84
UPDATE 6	Unit Supply		1 Dec 84

4. Articles

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Hartmann, *Factors in Aggravation and Mitigation: A Trap for the Sentencing Judge?*, 33 DePaul L. Rev. 357 (1984).

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Comment, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. Rev. 1101 (1984).

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Civil Appellate Jurisdiction: Part 1, L. & Contemp. Probs., Spring 1984, at 1.

Legal Issues in Electronic Publishing, 36 Fed. Com. L.J. 119 (1984).

The Constitutionality of the Victim and Witness Protection Act of 1982, 35 Ala. L. Rev. 529 (1984).

The Second Circuit Loosens Reins on NLRB Discretion, 50 Brooklyn L. Rev. 387 (1984).

By Order of the Secretary of the Army:

JOHN A. WICKHAM, JR.
General, United States Army
Chief of Staff

Official:

DONALD J. DELANDRO
Brigadier General, United States Army
The Adjutant General

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